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In The

Supreme Court of the United States

October Term, 1987

SUSAN MARY NORRIS,

Petitioner,

v.

WILLIAM W. WIRTZ, Individually, as Trustee, and as Executor of the Estate of ARTHUR M. WIRTZ, ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: September 4, 1987

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QUESTIONS PRESENTED

1. Whether this Court should settle the limitations and tolling principles applicable to Rule 10b-5 civil cases, answering what the Seventh Circuit characterized here as "pleas for help" from the bench and the bar in this "vexing" area of the law and resolving longstanding conflicts and confusion in the Circuits.

2. Whether the Seventh Circuit erred in carving out litigation under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 as an exception to the decisions in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), which require the application of state law tolling principles when state statutes of limitation are borrowed by the federal courts.

3. Whether the federal equitable tolling doctrine in Rule 10b-5 cases is based upon an "objective" standard which is blind to differences in the status or the degree of sophistication of individual investors.

4. Whether the decision of the Seventh Circuit, which reversed on statute of limitations grounds a verdict in favor of the female petitioner for securities fraud violations committed by her trustee, unconstitutionally discriminated against her, contrary to *Stanton* v. *Stanton*, 421 U.S. 7 (1975), by treating her as "legally an adult" at age eighteen, when a male of the same age would not have been so treated.

5. Whether the Seventh Circuit's adoption of a standard of "independent review of the record," by which it "reweighed" the evidence presented to the jury and, contrary to the jury, resolved conflicts in the evidence in respondents' favor, contravenes the Seventh Amendment to the Constitution of the United States as well as controlling decisions of this Court.

PARTIES TO THE PROCEEDINGS

Petitioner Susan M. Norris was the plaintiff-appellee below. Respondents William W. Wirtz, named individually and as Executor of the Estate of Arthur M. Wirtz, his father, Wirtz Corporation, St. Louis Arena Corporation and Arena Bowl, Inc. were defendants-appellants. Wirtz Corporation is a corporation closely held by Wirtz interests. Prior to the death of petitioner's father, James D. Norris, in 1966, the stock of respondents St. Louis Arena Corporation and Arena Bowl, Inc. was owned by Mr. Norris and by Wirtz Corporation. Following redemption of the stock of St. Louis Arena Corporation and Arena Bowl, Inc. from the Estate of James D. Norris, the stock of those corporations was wholly owned by Wirtz Corporation.

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WILLIAM W. WIRTZ, Individually, as Trustee, and as Executor of the Estate of ARTHUR M. WIRTZ, ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Susan Mary Norris respectfully petitions that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in *Norris* v. *Wirtz*, 818 F.2d 1329 (7th Cir. 1987), *reh'g denied*, in which a divided court reversed, on statute of limitations grounds, a judgment in petitioner's favor entered on a jury verdict which found that respondents had defrauded her in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5 promulgated thereunder.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 818 F.2d 1329 and is reproduced in Appendix A. The unreported opinion of the district court denying respondents' motions for judgment notwithstanding the verdict and for a new trial is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1987. (App. C) A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 11, 1987. (App. D) This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. U.S. Const. amend. VII.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j), provides, in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumen-

> tality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities and Exchange Commission Rule 10b-5, 17 CFR § 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Ill. Rev. Stat. 1967, ch. 3, par. 131, provides, in pertinent part:

> Males of the age of 21 and females of the age of 18 shall be considered of legal age for all purposes . . . and until these ages are attained, they shall be considered minors.

STATEMENT OF THE CASE

On appeal to the Seventh Circuit from the judgment against them, respondents did not contest the sufficiency of the evidence to support the jury's finding that the Wirtzes had defrauded petitioner Susan M. Norris in violation of

the Securities Exchange Act of 1934 and Rule 10b-5. Furthermore, petitioner is entitled to the benefit of all facts and inferences therefrom on which the jury specifically decided the limitations issues in her favor. Accordingly, the statement of facts herein summarizes the evidence adduced by her at the trial.

Petitioner is the daughter of James D. Norris, a successful businessman and sports magnate who died in 1966. During the administration of his Estate, Arthur Wirtz and William Wirtz, who was co-executor of the Norris Estate and testimentary trustee for petitioner's benefit, fraudulently purchased from themselves, as fiduciaries of the Estate and the testimentary trusts, stock in three closely-held corporations owned by James D. Norris at his death. The Wirtzes, who had been long-time friends and business associates of James D. Norris, engineered the transactions in 1967 and 1968 through three Probate Court petitions (PX 101, 301, 401) which contained false representations that the purchase prices for the Estate's stock in St. Louis Arena Corporation, Arena Bowl, Inc. and Judge & Dolph, Ltd. fairly reflected the value of the shares. Two of the petitions represented that the prices were "substantiated" by "valuations" of the corporate assets shown on balance sheets referred to in the petitions. No "valuation" in fact had been made. Although the petitions did not so state, the prices in reality were based upon the "book value" of the stock, utilizing historical cost for all assets, even though cost was substantially less than the fair market value of key assets. The Wirtzes also falsely stated in the petitions that the securities had to be sold to raise money for the payment of taxes when in fact there were liquid assets from which the taxes could have been paid.

After fraudulently procuring Susan Norris' uninformed consent to the transactions, William Wirtz, as executor of the Estate, presented the petitions to Chief Judge Robert J. Dunne of the Circuit Court of Cook Coun-

ty, Illinois, Probate Division, who approved each of the transactions after reviewing exactly the same fraudulent documents which had previously been shown to Susan Norris. In each instance, the stock was purchased from the Estate at a price substantially less than actual value. No guardian *ad litem* was appointed for Susan Norris in connection with the transactions or at any other time during William Wirtz's administration of the James D. Norris Estate.

Susan Norris had never even heard of the three corporations. At age 18, she had only a high school education, no business experience, and no one to advise her other than her fiduciaries, the Wirtzes. She did not understand "book value" and did not know what an independent appraisal was or that none had been made. (Tr. 1432, 1436-37) She had, however, known the Wirtzes since early childhood, and she "trusted Bill Wirtz and Arthur Wirtz and Ken Scranton [the Wirtzes' personal attorney, who acted as attorney for the Estate] completely." (Tr. 1423, 1446) She knew that William Wirtz, as executor and trustee, had to represent the interests of the beneficiaries and thought that Scranton was her lawyer. Scranton, who claimed to be acting as her attorney, was in fact acting solely for the Wirtzes and he himself testified that he performed "no overt act of any kind" to protect her interests. (Tr. 562)

After the three securities frauds, William Wirtz filed a First Current Account in the Probate Court in 1971 which mentioned the three sales but did not disclose respondents' self-dealing or any other information concerning the transactions. (PX 5) In three subsequent accounts, Wirtz did not even mention the transactions. (PX 6, 7, 8) In 1977, William Wirtz obtained orders from the Probate Court approving his Final Account, discharging him as executor and closing the Estate. In violation of Illinois law, Wirtz did not give notice of the hearings on any of the accounts or

of the discharge hearing to Susan Norris. *Norris* v. *Estate of Norris*, 143 Ill. App. 3d 741, 747, 493 N.E.2d 121, 126 (1986), *leave to appeal denied.* After closing the Estate, William Wirtz continued to act as testamentary trustee for Susan Norris, a position he held through the time of trial in December, 1985.

Prior to 1976, Susan Norris occasionally made inquiries of William Wirtz concerning the Estate and Norris-Wirtz businesses, but received only uninformative responses. (Tr. 1440-41, 1447) It was a basic policy of the Wirtzes that women were to have nothing to do with the Norris-Wirtz businesses, a policy which the Wirtzes firmly communicated to Susan Norris. (Tr. 1366, 1380)

In late 1975, shortly before her mother's death, Susan Norris consulted Emil S. Cuccio, a Hackensack, New Jersey attorney, in the hope of obtaining an increase in her $2,000 per month allowance from her father's estate. She also desired to have her mother's photograph placed in the program of the Chicago Blackhawks Hockey Team (a professional sports team operated by one of the Norris-Wirtz businesses), to have some participation in the Norris-Wirtz businesses and to have professional help in understanding current and future Estate matters, as they might be presented from time to time. (Tr. 1348-49) During 1976 and 1977, Cuccio had various discussions with William and Arthur Wirtz. These discussions related to requests by Cuccio for future action by the Wirtzes. While offering "cooperation" to Cuccio on various innocuous matters, the Wirtzes and Scranton made no disclosures to him concerning the frauds committed years before. Cuccio was not informed of and did not learn of the fraudulent transactions which had occurred in 1967-1968. (Tr. 707, 1354, 1398-1400)

Susan Norris learned of the facts constituting the fraud in 1979 and filed this action under Section 10b of the Exchange Act and Rule 10b-5 on December 24, 1980.

(Tr. 1445) The sufficiency of her complaint was upheld in *Norris* v. *Wirtz*, 719 F.2d 256 (7th Cir. 1983), *cert. denied*, 466 U.S. 929 (1984). The case was tried before Judge Susan Getzendanner and a jury over a two-week period in December, 1985.

On the limitations issue, Judge Getzendanner determined, in accordance with precedent in the Seventh Circuit, that the three-year statute of limitations applicable to civil actions under the Illinois Blue Sky Law should be borrowed. *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972). The district court refused petitioner's request to apply Illinois trust law tolling principles but held that federal equitable tolling principles were available to toll the running of the applicable statute of limitations. Accordingly, the jury was instructed on the limitations issue that Susan Norris had to prove either (1) fraudulent concealment by defendants (which would toll the statute of limitations until *actual* discovery), or (2) her due diligence in seeking to discover the facts giving rise to her claim. (Tr. 2103-04) These instructions were based upon tolling principles enunciated in *Tomera* v. *Galt*, 511 F.2d 504 (7th Cir. 1975) and *Goldstandt* v. *Bear, Stearns & Co.*, 522 F.2d 1265 (7th Cir. 1975). The jury was not instructed as to whether Susan Norris was to be treated as an adult or as a minor at the time of the transactions.

The district court requested the jury to make special findings as to whether petitioner had proved that each of her claims had been timely filed. The jury specifically found that each claim was timely filed. The jury also found against the Wirtzes on all three counts of securities fraud and determined that total damages to the Estate were $1,564,142. The district court ruled that Susan Norris' share of these damages was $832,855, and entered judgment in that amount. The district court later denied the Wirtzes' post-trial motions, holding, *inter alia*, that the evidence for Susan Norris on the tolling issue was sufficient

to support the jury's findings.[1]

A majority of a panel of the Seventh Circuit reversed the judgment on the jury's verdict. In its opinion, the Seventh Circuit declined to apply Illinois trust tolling principles under which the statute of limitations does not begin to run until the trust terminates or the trustee "repudiates" his trust. The Seventh Circuit reasoned that, notwithstanding the "seemingly dispositive" decisions of this Court, the Illinois tolling rule was inconsistent with an assumed Congressional "plan" of the Exchange Act that a plaintiff be allowed no more than three years after the transaction occurred in which to file a civil action under the Exchange Act. 818 F.2d at 1331-1334; App. A3-10. Next, despite the jury verdict and the views of the "experienced" trial judge that the evidence was sufficient to justify the verdict, the majority held that their "independent review of the record" led them to a "firm belief" that plaintiff (treated as an "adult" under an "objective" standard) had not exercised due diligence in discovering the fraud of her fiduciaries. The majority held that Susan Norris should have understood in 1967, when she was 18 years old, on the basis of the fraudulent papers then shown her, that the purchase prices of the shares were based on book value, that no "independent appraisal" had been made of the shares, and that the transactions were suspect because her father's will had placed the Wirtzes in a conflict-of-interest position. In essence, the majority held that petitioner, an adolescent, high school girl, should have been alerted to suspect fraud from the very papers which the Probate Judge had examined and which had not

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[1] The Seventh Circuit majority states in its opinion that Judge Getzendanner found that the evidence "barely" supported the jury's special findings that the claims were timely. 818 F.2d at 1336; App. A13. In fact, Judge Getzendanner made no such statement or finding. App. B2.

alerted him to anything amiss.[2]

In the alternative, the Seventh Circuit majority held that the statute of limitations began running no later than November, 1977 because Susan Norris could then have told Cuccio about the 1967-1968 sales and could have informed him that there had been no "independent appraisal" of the stock sold ten years before. In particular, according to the majority, she should have been alerted so as to inform Cuccio in connection with another transaction discussed by the Wirtzes and Cuccio in November, 1977, when Cuccio stated that an independent appraisal should be made of the shares then under discussion. The majority totally ignored the fraudulent concealment instruction on which the jury verdict may have been based. 818 F.2d at 1335-1336; App. A12-13.

Judge Cudahy dissented, summarizing the evidence on which the jury verdict was based and pointing out that in 1967 and 1968 Susan Norris was an adolescent dependent upon the Wirtzes, with no knowledge of book values or the need for an independent appraisal, and that the Wirtzes' "male only" policy later excluded her from access to information. The dissent further noted the conflicting evidence

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[2] The majority held that "[t]he documents handed to Susan in 1967, coupled with the identity of the trustee and the corporations in question, were enough to put a reasonable person on notice of the need for inquiry. Such an inquiry promptly would have turned up everything necessary to file a complaint." 818 F.2d at 1334; App. A11. The "documents" and other information alluded to by the Seventh Circuit were also given to Judge Dunne, who did not see any need for inquiry. The majority says that this "deceit [was] so easy to uncover from documents in hand" (818 F.2d at 1334; App. A10), but does not say why the Probate Judge did not discover it. It also posits that Susan Norris "should have" known (1) what book value was, and (2) that a "more plausible" method of valuation would have been based on the income stream of St. Louis Arena Corporation. The jury obviously disagreed that any "objectively reasonable" person, let alone an 18 year old girl, "should have known" these things.

concerning the scope of Cuccio's assignment, the fact that he was never told about the 1967 and 1968 transactions, and that an examination of the Probate Court file would not have revealed the fraud. 818 F.2d at 1336-1337; App. A14-15. The dissent concluded:

> When an adolescent girl is allegedly defrauded by her trustee, who is also an old family friend and essentially a surrogate father, under circumstances like these, I see little reason to distrust the jury verdict. The jury had ample grounds for deciding as it did. Contrary to the approach taken by the majority, so long as there is sufficient evidence in the record to support the jury's verdict, *it is not for this court to reweigh the evidence.* 818 F.2d at 1337; App. A15. (Emphasis added)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD SETTLE THE LIMITATIONS AND TOLLING PRINCIPLES FOR RULE 10b-5 LITIGATION AND REVERSE THE SEVENTH CIRCUIT'S HOLDING THAT STATE TOLLING PRINCIPLES DO NOT APPLY IN SUCH LITIGATION

The Seventh Circuit majority opinion endorses the "plea for help" to this Court from the bench and bar for "uniformity and predictability" in limitations and tolling principles in Rule 10b-5 civil actions. Describing the current law as a "mess" (818 F.2d at 1333; App. A7), the majority opinion laments the "untold hours" which are "wasted" by courts in deciding which state statutes of limitation and tolling principles to apply in such cases. 818 F.2d at 1332; App. A5. It continues:

> Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law, for help. As the ABA's Committee on Federal Regulation of Securities observed . . . the courts of appeals disagree on every possible ques-

> tion about limitations periods in securities cases. *Only Congress or the Supreme Court can bring uniformity and predictability to this field . . . . Id.* (Emphasis added)

The Seventh Circuit's makeshift solution to the Rule 10b-5 limitations and tolling problems amounts to a repudiation of decisions by this Court which are clearly controlling, and which the Seventh Circuit recognized as such. The Seventh Circuit effectively holds that it will not apply state tolling principles in Rule 10b-5 litigation if to do so would allow the plaintiff to sue more than three years after the fraudulent transaction occurred. 818 F.2d at 1333-1334; App. A8-10.

In Rule 10b-5 litigation the federal courts have consistently borrowed (or "absorbed") state statutes of limitations, a practice which this Court has noted approvingly. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 n.18 (1983). In *Hochfelder*, the Court observed that the state statutes of limitations applied by the federal courts in Rule 10b-5 actions typically are longer than the period of limitation provided for in §13 of the Securities Act of 1933. The Court made a similar observation in *Herman & MacLean*, and went on to note that the federal courts had consistently and routinely permitted a plaintiff to proceed under Rule 10b-5 even where express remedies under other sections of the securities laws were available. The Court did not mention any conflict between this practice and any supposed Congressional "plan" of "repose" after three years.[3]

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[3] The term "repose" is used in this Petition with the meaning given to it by the Seventh Circuit, i.e., an absolute outside time limit for the filing of suit. The Seventh Circuit majority believes that for Rule 10b-5 cases, that "repose" period should not exceed three years after the transactions. "That (Congressional) plan called for uniform statutes of limitations *coupled with statutes of repose*." 818 F.2d at 1332; App. A6.

Despite this Court's endorsement of borrowing in *Hochfelder* and *Herman & McClean*, the borrowing or absorption of a particular statutory time period does not materially advance resolution of limitations issues unless it is also known when the time period begins to run. Consequently, the related issue of tolling is of paramount practical importance in Rule 10b-5 litigation. As this Court stated in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463 (1975), "any period of limitations . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action . . . ."

In this case, petitioner and respondents all recognized that, under the Seventh Circuit authorities, the Illinois three-year statute of limitations under the Illinois Blue Sky Law was applicable. *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972). The dispute was only over tolling.

The "vexing" difficulty and "mess" in which the Seventh Circuit believed itself to be mired stems from Illinois tolling principles applicable to a fraud perpetrated by a fiduciary against his beneficiary. Under Illinois law, the statute of limitations for a damage suit by a beneficiary against a trustee does not *begin* to run until either (1) the trust terminates, or (2) the trustee "renounces" (or "repudiates") the trust by "notifying the beneficiary of his treachery". *Holyoke* v. *Continental Illinois Nat. Bank & Trust Co.*, 346 Ill. App. 284, 104 N.E.2d 838 (1952); *Kay* v. *Village of Mundelein*, 36 Ill. App. 3d 433, 438, 344 N.E.2d 29, 33 (1975); *Dawes* v. *Dawes*, 116 Ill. App. 36, 40 (1904). This doctrine was summarized by the Seventh Circuit in *Jefferson National Bank* v. *Central National Bank in Chicago*, 700 F.2d 1143 (7th Cir. 1983), as follows:

> *To cause the statute [of limitations] to begin running during the life of the trust there must be some act of repudiation of the trust by the trustee . . . . He must in some way notify the beneficiary of his*

> *treachery. Concealed repudiation does not count.* 700 F.2d at 1151, citing *Kay, supra,* 36 Ill. App. 3d at 438, 344 N.E.2d at 33. (Emphasis in original)

In *Jefferson National* the Seventh Circuit expressly noted that under this principle the beneficiary had no duty to investigate the conduct of his beneficiary, saying:

> Until Central [the trustee] repudiated the trust placed in it in 1974, Philip Litner had a right to rely upon the integrity and faithfulness of his trustee. See *Reynolds* v. *Sumner,* 126 Ill. 58, 18 N.E. 334, 337 (1888). Until it was brought to the attention of the beneficiary, Philip Litner, that Central's fiduciary duty of trust had been breached, he could safely continue to rely on that duty without forfeiting his rights under the law. We know of no affirmative duty placed upon the beneficiary of a trust to actively investigate or oversee the conduct of his trustee. 700 F.2d at 1151-1152.

As early as 1874 this Court itself in *Lewis* v. *Hawkins,* 90 U.S. 119 (1874), approved the principle that:

> 'As between trustee and *cestui que trust,* in the case of an express trust the statute of limitation has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years....'[4] 90 U.S. at 126, citing Perry on Trusts, § 863.

The Seventh Circuit acknowledged (818 F.2d at 1331; App. A4) that under this Court's decisions in *Board of Regents* v. *Tomanio,* 446 U.S. 478 (1980) and *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454 (1975), when federal law absorbs state limitations law, the *whole* of state limitations law (including tolling rules) must be incorporated

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[4] This aspect of *Lewis* was discussed by the Seventh Circuit in *Nemkov* v. *O'Hare Chicago Corp.,* 592 F.2d 351, 356 (7th Cir. 1979), along with *Manufacturer's Trust Co.* v. *Kelby,* 125 F.2d 650, 654 (2d Cir.) (L. Hand), *cert. denied,* 316 U.S. 697 (1942).

unless to do so would violate a "federal policy underlying the cause of action." Application of the Illinois rule would mean that the suit was clearly timely, since the trust continued and William Wirtz had neither resigned nor "repudiated" his fiduciary status before this suit was filed on December 24, 1980.

The *Tomanio* and *Johnson* decisions clearly require the utilization of state tolling principles attached to the status or capacity of the individual plaintiff. *Johnson, supra,* 421 U.S. at 64; *Barney* v. *Oelrichs,* 138 U.S. 529 (1891); *Robertson* v. *Wegmann,* 436 U.S. 584 (1978) (holding Louisiana survivorship law applicable to an action under 42 U.S.C. § 1983). State law must therefore determine in a Rule 10b-5 case the tolling principles applicable to a child, a prisoner or an incompetent adult. *See Bailey* v. *Faulkner,* 765 F.2d 102 (7th Cir. 1985). So, too, Illinois law here provides the tolling principles for trust beneficiaries defrauded in violation of Rule 10b-5. The Seventh Circuit had previously so indicated in *Nemkov* v. *O'Hare Chicago Corp.*, 592 F.2d 351, 356 (7th Cir. 1979). Similarly, in *Bailey,* the Seventh Circuit held in a case under 42 U.S.C. § 1983 that it was obligated by *Tomanio* to allow plaintiff the benefit of state law which tolled the statute of limitations during plaintiff's "legal disability" due to his imprisonment. The Seventh Circuit correctly noted in *Bailey* that "the only basis on which the Court in *Tomanio* was willing to consider not borrowing a tolling provision was if it would produce results inconsistent with the policies underlying section 1983, and we cannot say that a provision that gives more time than he would otherwise have (or deserve) in which to bring suit under that section would be inconsistent with the policies of Section 1983." 765 F.2d at 104. Yet the Seventh Circuit has now refused to follow *Tomanio* and *Johnson* in Rule 10b-5 cases, and has declined to accord plaintiff, as a trust beneficiary defrauded by her trustee, the benefit of the Illinois tolling principles

which the Seventh Circuit itself recognized and applied in *Jefferson National*.

The Seventh Circuit's decision to carve out Rule 10b-5 litigation as an exception to *Tomanio* and *Johnson* is a product of its frustration over its admitted inability ("too late") to overrule the unanimous body of case law, including its own, which applies state limitations law and tolling principles in Rule 10b-5 cases. The Seventh Circuit majority nevertheless believes that *any* form of reposeless equitable tolling is contrary to the "plan" of the Exchange Act.[5] The majority thus denigrates the principles of *Tomanio* and *Johnson* as "one tottering parapet of a ramshackle edifice" and explicitly refuses to apply state tolling law in Rule 10b-5 litigation, even though it recognizes that *Tomanio* and *Johnson* are "seemingly dispositive" in requiring it to do so. The Seventh Circuit also undermines quite explicitly its own prior decision, *Suslick* v. *Rothchild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir. 1984), in which it had held that in Rule 10b-5 cases the plaintiff may *choose* either the federal equitable tolling doctrine or the applicable state tolling doctrines. "Yet in *Suslick*, decided after *Tomanio*, we intimated that plaintiffs may have things both ways . . . ." 818 F.2d at 1331; App. A5.[6]

The Seventh Circuit's refusal to follow *Tomanio* and *Johnson* in Rule 10b-5 cases is thus based on a rejection of

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[5] The Seventh Circuit majority complains that the courts (presumably including this Court) "missed a turn" in allowing tolling at all and "[t]hat [a statute of repose no longer than three years] is what the courts should have used" for Rule 10b-5 cases. 818 F.2d at 1333; App. A7.

[6] The logic of *Suslick* was simple and direct: the federal tolling doctrine had always been applicable in Rule 10b-5 cases. *Tomanio*, however, gave the plaintiff the additional benefit of state tolling principles which are more favorable to him than the federal tolling doctrine. Now this case, *Norris*, has created further confusion and conflict and promises to engender still more. *See Hemmings* v. *Barian*, 822 F.2d 688 (7th Cir. 1987).

several decades of jurisprudence. The majority refuses to apply Illinois tolling principles in Rule 10b-5 cases because of its professed belief that to do so would take it "farther" from what it perceived to be the statutory "plan" of the Exchange Act (818 F.2d at 1333; App. A8) which, the Seventh Circuit believes, "called for uniform statutes of limitations *coupled with [three year] statutes of repose*" derived from the specific rights of action created by the Exchange Act and their corresponding express limitation provisions. 818 F.2d at 1332; App. A6.

The new exception to *Tomanio* and *Johnson* carved out by the Seventh Circuit for Rule 10b-5 cases cannot be reconciled with those decisions, with the Seventh Circuit's own prior decisions in *Bailey*, *Suslick* and *Nemkov*, or with the structure and language of the Exchange Act, for the following reasons:

1. The holdings of this Court in *Tomanio* and *Johnson* requiring use of state tolling principles apply to *all* federal claims for which state statutes of limitations are borrowed. Nothing in these cases suggests that Rule 10b-5 cases are exempt from *Tomanio* and *Johnson*. This Court stated in *Johnson* that "in borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, *and exceptions thereto*, on the prosecution of a closely analogous claim." 421 U.S. at 464. (Emphasis added.)

2. The Seventh Circuit's reliance on the Exchange Act limitations periods for express rights of action as a basis for carving out a Rule 10b-5 litigation exception to *Tomanio* and *Johnson* is unjustified. Since Congress did not create any express private right of action for violation of Section 10b of the Exchange Act, no inference can be drawn as to what its "intention" or "plan" concerning a limitation period - - or a tolling principle - - would have been if it *had* created one. The federal courts have uniformly refused to apply the limitation periods applicable to express causes

of action under the Exchange Act to the implied right of action under Section 10(b) and Rule 10b-5, and have looked to state law instead - - a practice which this Court endorsed in *Hochfelder* and *Herman & MacLean.*

3. Congress has not enacted any amendment to the Exchange Act adopting a "repose" period for Rule 10b-5 cases, even though it is surely aware of the universal and long-standing judicial use of state and federal tolling concepts without "repose" in Rule 10b-5 litigation.[7] As recently as 1975, Congress undertook a major revision of the securities laws (*Herman & MacLean, supra,* 459 U.S. at 384) without disturbing this body of law.

4. The Seventh Circuit, while recognizing that it cannot adopt the express Exchange Act limitations periods in Rule 10b-5 cases, nevertheless inconsistently uses those same provisions as a basis for refusing to apply Illinois tolling principles.

5. There is no federal law or policy "underlying the cause of action" which conflicts with or prevents the use of state tolling doctrine in Rule 10b-5 cases. The only Congressional "plan" or "intention" relevant to Rule

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[7] Nor was there any "repose" for civil actions under the Illinois Blue Sky Law, despite a footnote to the Seventh Circuit opinion suggesting arguments which, the Seventh Circuit acknowledges, were never made by the Wirtzes. The footnote cites a "repose" amendment to the Illinois Blue Sky Law which did not take effect until January, 1986, *after* the trial in this case. The 1986 amendment is thus inapplicable. Before 1986, the Illinois Blue Sky Law clearly embraced tolling without "repose." Indeed, in *Peoria Union Stock Yards Co. Retirement Plan* v. *Pennsylvania Mutual Life Insurance Co.,* 698 F.2d 320, 328 (7th Cir. 1983), the Seventh Circuit itself held that "fraudulent concealment tolls the statute of limitations in . . . a securities claim in Illinois," citing *Turpoff* v. *Karandjeff,* 17 Ill. 2d 462, 162 N.E.2d 1 (1959), which likewise, in a fiduciary context, endorsed tolling without "repose." It is not surprising, therefore, that the Wirtzes did not make the arguments found in the Seventh Circuit's footnote.

10b-5 tolling is the overriding purpose of the Exchange Act to protect securities investors, including the "uninformed, the ignorant, the gullible." *Parrent, supra*, 455 F.2d at 126, citing *Surowitz* v. *Hilton Hotels Corp.*, 342 F.2d 596, 602 (7th Cir. 1965). This Court has stressed that the implied right of action under Rule 10b-5 must be liberally construed. *Superintendent of Insurance* v. *Banker's Life and Casualty Co.*, 404 U.S. 6, 12 (1971).

6. The Seventh Circuit's rejection of Illinois tolling principles because those principles lack "repose" is inconsistent with the use of the *federal* tolling doctrine which the Seventh Circuit reluctantly concedes to be applicable in Rule 10b-5 cases and which similarly lacks any "repose."[8] It is internally contradictory to say on the one hand that a supposed Congressional "plan" (1) precludes use of state tolling principles because they lack "repose" but (2) permits use of *federal* tolling principles which likewise lack "repose."

In the interest of resolving uncertainty,[9] this Court

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[8] The Seventh Circuit states that *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) "hints" at the use of federal tolling principles in cases where a statute of limitations is borrowed for state law. However, in *Holmberg* state law apparently did not provide any tolling principles applicable under the circumstances. The Court observed that "[i]t would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine." 327 U.S. at 397.

[9] This Court has, in recent years, granted certiorari in a number of cases in addition to *Tomanio* and *Johnson* to resolve limitations issues in important areas of federal litigation. *See Wilson* v. *Garcia*, 471 U.S. 261 (1985) (holding state statutes of limitations for personal injury damage actions applicable to actions under 42 U.S.C. § 1983); *Del Costello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983) (limitations period of Sec-

(Footnote continued on the following page)

should answer the "plea for help" -- but not by accepting the Seventh Circuit's virtual elimination of state tolling law in Rule 10b-5 litigation. We respectfully submit that the proper resolution, already discernable from this Court's decisions, is as follows:

(1) Because Congress provided no express right of action for violation of Section 10b-5, the express limitations provisions in the Exchange Act are of no assistance in resolving the issue of which limitations and tolling concepts should apply. Consequently, the Seventh Circuit's perceived Congressional "plan" is an illusory basis for refusing to apply state tolling rules.

(2) Congress has had ample opportunity to express its disagreement, if any, with the current "borrowing" practice, but has not done so. Its silence indicates consent to or acquiescence in this approach. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946); *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 704 (1966) ("yet when Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations.")

(3) The federal courts should continue to employ state statutes of limitations most closely analogous to Rule

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tion 10b of the National Labor Relations Act applies to an action by an employee against his employer and union for, respectively, breach of a collective bargaining agreement and inadequate representation); *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983) (in accordance with Puerto Rican law, limitations period began to run anew after denial of class certification in an action under 42 U.S.C. § 1983). The Court recently addressed the question of the limitations period applicable to civil suits under the Racketeer Influenced and Corrupt Organizations Act, adopting the four year Clayton Act limitation period for civil RICO actions. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987). The reasons for granting certiorari here are even more compelling because of the very real concerns stressed here by the Seventh Circuit majority and because of the frequency, scope and seriousness of Rule 10b-5 litigation.

10b-5. Either Blue Sky or common law fraud statutes of limitations would be logical choices, but the Court should settle that matter, just as it did in *Wilson* v. *Garcia* 471 U.S. 261 (1985) for Section 1983 cases. The federal courts should also use applicable state tolling principles in Rule 10b-5 cases, in accordance with *Tomanio* and *Johnson*, including those relating to status, such as infancy, imprisonment, incompetency and fiduciary relationships.

This resolution of the limitations and tolling issues would reconcile the conflicting decisions of the Courts of Appeals and bring a degree of certainty and predictability to Rule 10b-5 litigation sorely lacking in the decades since the recognition of a private right of action under Rule 10b-5. It will also result here in the reversal of the Seventh Circuit and the affirmance of the judgment entered by the district court on the jury verdict.

II.

THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE FEDERAL EQUITABLE TOLLING DOCTRINE IS BASED UPON AN "OBJECTIVE STANDARD" WHICH IS BLIND TO DIFFERENCES IN THE SOPHISTICATION OF DEFRAUDED INVESTORS

The Seventh Circuit, in conducting its "independent review" of the record on the way to a reversal of the jury verdict and the district court, holds that the federal equitable tolling doctrine rather than Illinois tolling law applies to the limitations issue. However, it then states (818 F.2d at 1334; App. A9):

> The rule of law applicable to this case therefore is, as the district court concluded, that the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit is based. The investor need not actually know the facts or appreciate their significance; the 'could have discovered' branch of the test is objective.

See *United States* v. *Kubrick*, 444 U.S. 111, 120-24, 100 S. Ct. 352, 358-60, 62 L. Ed. 259 (1979); *Nemmers* v. *United States*, 795 F.2d 628, 631-33 (7th Cir. 1986).

This holding that the federal tolling doctrine in Rule 10b-5 cases is based on an "objective" test obliterates the significance of any individual characteristics of plaintiffs in Rule 10b-5 litigation, including age, degree of sophistication and even the existence of a fiduciary relationship. Here, it equates an 18-year old trust beneficiary with the ruthless businessmen who defrauded her. It is the use of this "objective" test which, the Seventh Circuit believes, enables it to substitute its own judgment for that of the jury and the district court and to conclude that at age 18 the plaintiff should have had the Diogenean cynicism to suspect fraud - - when the Probate Judge did not. No *conceivable* jury, of course, would conclude that the age, experience and fiduciary factors should be ignored, and the jury here did not.

In describing the "vexing" problem and "mess" created by Rule 10b-5 limitations issues, the Seventh Circuit cites the Report of the Task Force on Statute of Limitations for Implied Actions of the ABA's Committee on Federal Regulation of Securities, which notes that conflicts in the federal case law as to whether federal equitable tolling is "objective" or "subjective" have compounded the uncertainty in this area. 41 Bus. Law. 645 at 654-655 (1986). In an earlier case, *Sperry* v. *Garggen*, 523 F.2d 708 (7th Cir. 1975), the Seventh Circuit itself had lined up on the "subjective" side of the issue, emphasizing that the degree of sophistication is important in Rule 10b-5 tolling questions and is solely a question of fact for the jury. Authorities in other Circuits support this view. *Dzenits* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 172 (10th Cir. 1974); *Ohio* v. *Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402, 408 (D. Colo. 1979), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Lang* v. *Paine, Webber,*

Jackson, Curtis, Inc., 582 F. Supp. 1421, 1428 (S.D.N.Y. 1984); *Kaufman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 540 (D. Md. 1978); *Morgan* v. *Dain Bosworth*, 545 F. Supp. 953, 956 (D. Colo. 1982).[10]

The Court should resolve this conflict even if it concludes that the federal equitable tolling doctrine applies here to the exclusion of Illinois tolling law. As this case itself demonstrates, there is great practical significance in the issue. Any view of tolling which fails to take into account the relative degree of sophistication of securities investors is at odds with the *equitable* purpose underlying tolling as well as with this Court's articulation of federal tolling concepts in non-Rule 10b-5 contexts. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). It matters not whether the terminology "subjective" or "objective" is used. What is essential is that the reasonableness of the plaintiff's conduct can only be evaluated by the jury in the concrete, real world circumstances in which the plaintiff is defrauded. Contrary to the abstract, ethereal views of the Seventh Circuit majority, it matters greatly whether the plaintiff is a child or an adult, an illiterate or an investment banker, a trust beneficiary or a speculator, an inexperienced high school girl or hardened businessmen like the Wirtzes. The failure of the Seventh Circuit to recognize this takes the "equitable" element out of tolling and provides the faulty rationale for second-guessing the jury by finding that a

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[10] The cases cited by the Seventh Circuit majority do not support its "objective" test. This Court's decision in *U.S.* v. *Kubrick*, 444 U.S. 111 (1979), did not involve either Rule 10b-5 or the federal equitable tolling doctrine but rather the specific statutory language of the limitations provision of the Federal Tort Claims Act in a medical malpractice situation. The Seventh Circuit decision in *Nemmers* was also a medical malpractice case against the Government and followed *Kubrick*. Moreover, in *Kubrick* the Court made it clear that the trier of fact, not the appellate court, shall resolve these issues. Here, the Seventh Circuit contradicts the *Kubrick* approach to the facts.

naive 18-year old girl "should have" detected fraud where an experienced probate judge did not.

III.

THE SEVENTH CIRCUIT'S TREATMENT OF PETITIONER AS "LEGALLY AN ADULT" WHEN SHE WAS DEFRAUDED IN 1967 AND 1968 CONTRAVENES THIS COURT'S DECISION IN *STANTON* V. *STANTON*, 421 U.S. 7 (1975), AND DENIES HER EQUAL PROTECTION OF THE LAWS

In applying this "objective" standard of care to Susan Norris, the majority relies on the fact that she was 18 years old and therefore "legally an adult" at the time of the Wirtzes' securities frauds in 1967 and 1968. In the opening sentence of its opinion, the majority states: "In 1967 and 1968 Susan Mary Norris, an *adult beneficiary* of her father's testamentary trust, consented to three sales of assets of the trust." 818 F.2d at 1330; App. A1. (Emphasis added)

Later, at the outset of its "independent review" of the evidence on the "due diligence" issue, the Seventh Circuit states:

> Although Susan, *only 18 at the time*, did not appreciate what was going on and why an appraisal was called for, she was *legally an adult* and of sound mind. The statute begins to run when a reasonable person would have appreciated the need for further inquiry. An objectively reasonable person would have appreciated the need for further inquiry in 1967. 818 F.2d at 1334; App. A10. (Emphasis added)

Having decided that "Susan . . . did not know what was going on" at the time of the transactions but that she was nevertheless chargeable with knowledge because she was "legally an adult," the Court of Appeals then performs an "independent review" and weighs the evidence pertaining to two distinct periods: (1) 1967-1968, when the fraud

occurred, and (2) 1975-1977, when Susan Norris was represented by Emil Cuccio. As to the first period, the Court of Appeals holds that Susan Norris, "legally an adult," should have known the need for further inquiry in 1967-1968 and that therefore her claims were barred in 1970-71. 818 F.2d at 1334; App. A10. Alternatively, the Seventh Circuit holds that after attorney Cuccio's involvement the statute of limitations began to run "no later than November 1977" because Susan Norris could and should have told Cuccio in 1976-1977 what she had supposedly learned in 1967-1968, when she was "legally an adult", and that, armed with that knowledge, Cuccio could have discovered the fraud. "Coupled with what Susan knew in 1967, Cuccio had enough to spark an inquiry, indeed to file this suit, in November, 1977." 818 F.2d at 1335-1336; App. A13. That Susan Norris may have "forgotten" what she was told 10 years before, at age 18 (assuming that she had then understood it) is, according to the Seventh Circuit, irrelevant. 818 F.2d at 1336; App. A13. According to this view petitioner's suit was filed about one month too late.

The Court of Appeals' finding that Susan Norris was "legally an adult" in 1967-1968 is thus critical to its statute of limitations view of both the 1967-1968 and 1975-1977 periods. The Seventh Circuit's treatment of her as an adult, however, is also a sex-based discrimination in direct conflict with the Fourteenth Amendment and this Court's decision in *Stanton* v. *Stanton*, 421 U.S. 7 (1975).

The Illinois majority statute in effect during 1967 and 1968 provided:

> Males of the age of 21 and females of the age of 18 shall be considered of legal age for all purposes . . . and until these ages are attained, they shall be considered minors. Ill. Rev. Stat. 1967, ch. 3, par. 131.

This is the statute upon which the Seventh Circuit based its findings that Susan was "legally an adult" in 1967 and therefore was to be judged under an "objectively reasonable

person" standard for the purpose of evaluating her "due diligence" in discovering her trustee's fraud.

The Illinois majority statute is identical in all material respects to the Utah statute held to be an unconstitutional deprivation of equal protection in *Stanton, supra*. In *Stanton*, this Court indicated that Utah could equalize the age of legal majority at whatever age it chose. 421 U.S. at 17-18. Following *Stanton*, the Illinois court in *Jeschke* v. *Ruhlow*, 59 Ill. App. 3d 125, 376 N.E.2d 15 (1978), dealt with the discriminatory Illinois majority statute and held in a statute of limitations context that it was a violation of both the United States and Illinois Constitutions for a female to be given a shorter time than a male within which to file suit. The Illinois Court in effect equalized the age of legal majority at age 21 *for statute of limitations purposes.*[11]

The Seventh Circuit's treatment of Susan as "legally an adult" and its application of an "objective person" standard to her at age 18, although it could not have so treated a male of the same age, directly conflicts with *Stanton*. If Susan were a male, the jury verdict in her favor would have been upheld by the Seventh Circuit. Because she is a female, it was reversed, depriving her of almost $1,000,000, notwithstanding the fraud committed against her by her fiduciaries, as found by the jury and not disputed on appeal. The language of the Illinois court in *Jeschke* is in point here:

> We do not condone a failure to proceed to trial in an expeditious manner. However, it remains uncontroverted that were the instant plaintiff of the masculine gender, her suit would have been timely filed. She was, therefore, the target of an unconstitutional statutory discrimination and to

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[11] Later, in *Munck* v. *Munck*, 62 Ill. App. 3d 223, 378 N.E.2d 1252 (1978), the Illinois Appellate Court equalized male and female majority at age 18 for *child support purposes*, but left intact its limitations holding in *Jeschke*.

> bar her suit upon application of the Limitations Act would serve to deny her equal protection of the law. 59 Ill. App. 3d at 129, 376 N.E. 2d at 17.

The Constitutional defect of treating Susan Norris as an adult appeared for the first time in the Seventh Circuit's opinion, since the issue of adulthood vs. childhood had not been raised in the district court. There, the plaintiff prevailed before the jury under instructions applicable to an adult and would surely have prevailed if the jury had been instructed that she was "legally a child" in 1967 and 1968. Only the Seventh Circuit majority considered it relevant that she was "legally an adult" - - and they made it dispositive. Although this error was stressed in the petition for rehearing, the Seventh Circuit ignored *Stanton*, thereby sanctioning the very evil which *Stanton* decried. Susan Norris was entitled to have the judgment of the district court affirmed on any ground, even one not relied on in that court. *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 71 (1974). The Seventh Circuit's disregard of *Stanton* is inexplicable and should not be countenanced.

IV.

THE MAJORITY'S ADOPTION OF A NEW STANDARD OF "INDEPENDENT REVIEW" OF JURY VERDICTS, BY WHICH IT "REWEIGHS" THE EVIDENCE, IS IN CONTRAVENTION OF THE SEVENTH AMENDMENT

A review of the Seventh Circuit majority and dissenting opinions clearly shows that the evidence on the due diligence issue was in conflict and that there was substantial evidence in Susan Norris' favor. Since the "due diligence" issue, after all, was closely analogous to the traditional jury question of "due care" or "negligence," it would be expected that appellate review of a verdict supported by such evidence would result in affirmance, especially where, as here, the reviewing court finds that the jury was correctly instructed as to the law. Here, however, the Sev-

enth Circuit reversed the jury and the "experienced" district judge, utilizing a new standard of review by which the majority substituted its own view of the evidence for that of the jury and the district court and concluded that an "objectively reasonable" 18 year old should have suspected fraud where an experienced probate court judge did not.

The accepted standard of review is that a jury verdict may not be overturned unless there is no evidentiary basis for it. *Basham* v. *Pennsylvania R.R. Co.*, 372 U.S. 699, 700 (1963). *See also Zenith Radio Corp.* v *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).[12] The Seventh Circuit majority, however, *openly* departs from the accepted standard of appellate review of jury verdicts by employing a new appellate standard which it calls "independent review of the record." 818 F.2d at 1336; App. A13. The dissent notes the difference in the standards:

> The jury had ample grounds for deciding as it did. Contrary to the approach taken by the majority, so long as there is sufficient evidence in the record to support the jury's verdict it is not for this court to reweigh the evidence.[13] 818 F.2d at 1337; App. A15.

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[12] Until it changed course in this case, the Seventh Circuit had consistently followed this standard. *Lippo* v. *Mobile Oil Corp.*, 776 F.2d 706, 716 (7th Cir. 1985) ("we will not reweigh the evidence . . . but will let the verdict stand 'unless there is no rational connection between the evidence . . . and the verdict' "); *U.C. Castings Co.* v. *Knight*, 754 F.2d 1363, 1369 (7th Cir. 1985); *Abernathy* v. *Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983).

[13] It is very clear that the dissent's characterization of what the majority did ("reweighing" the evidence) is accurate. Nowhere in the majority opinion is there any intimation that there was not substantial evidence to support the verdict. Nor does the majority even give lip service to the accepted standard of review of jury verdicts. Instead, it retries the evidence which the jury heard and in doing so recasts the facts of record.

In attempting to justify its "independent review of the record" standard and its departure from the accepted standard of review, the majority states that "the facts are largely undisputed although the parties contest the inferences." 818 F.2d at 1334; App. A10. This statement is incorrect, as is the majority's truncated and inaccurate recitation of the "facts." However, even if it were true that only "inferences" were in dispute, this does not expand the permissible scope of review; the jury is the ultimate arbiter of "inferences" as well as historical facts. *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1984).

The Court of Appeals was not constitutionally entitled to adopt its new "independent review" standard. From time to time this Court has found it necessary to remind the Courts of Appeals of the respect due to jury verdicts, emphasizing that the jury's role as ultimate finders of fact is rooted in the language of the Constitution:

> [I]t is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.' *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, supra*, 369 U.S. at 360, citing *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 538-539 (1958).

In applying these principles the Court has reversed state and federal appellate courts that have set aside verdicts supported by far less evidence than that summarized in Judge Cudahy's dissent here. In *International Terminal Operating Co.* v. *N.V. Nederl. Amerik Stoomv.* v. *Maats*, 393 U.S. 74, 75 (1968), where the issue was also whether the plaintiff had acted "reasonably," the Court of Appeals reversed a jury verdict for the plaintiff because it concluded on its review of the evidence that the plaintiff "had not taken reasonable action as a matter of law." This Court reinstated the jury verdict, stating that "[u]nder the Seventh Amendment, that issue should have been left to the jury's determination." *Id.*

In *Basham, supra*, plaintiff alleged that defendant was

negligent because a platform on which he was working moved. There was substantial evidence that "it was physically impossible for the accident to have happened in the manner claimed by the petitioner," 372 U.S. at 700. The trial judge therefore set aside a jury verdict for the plaintiff, and was affirmed in the New York appellate system. This Court reversed, stating:

> The conflict in the testimony was resolved by the jury's verdict in favor of the petitioner. Since there was an evidentiary basis for that verdict, it was error for the New York trial court and appellate courts to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury. *Basham* v. *Pennsylvania R.R. Co.*, 372 U.S. 699, 700 (1963).

Under the scope of appellate review mandated by the Seventh Amendment and by this Court's decisions in *Basham*, *Zenith Radio* and *Atlantic & Gulf Stevedores*, the jury verdict for Susan Norris would be upheld. That is apparently why the Seventh Circuit found it necessary to adopt a new standard of "independent review" as a basis for reversal. It erred in so doing, and its error will surely be repeated in subsequent Seventh Circuit decisions, no doubt spreading to other Circuits as well. There can be a strong judicial temptation to second-guess or ignore juries, and in recent years that has been especially true in the Seventh Circuit. In the last several years the Seventh Circuit has, in a succession of cases, repeatedly reversed jury verdicts with little or no homage to the standard of review rooted in the Seventh Amendment and often to the detriment of plaintiffs seeking redress under federal law or the Constitution. *See, e.g.*, *Vaughn* v. *General Foods Corp.*, 797 F.2d 1403 (7th Cir. 1986) (jury finding of fraud); *Olympia Equip. Leasing Co.* v. *Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1574 (1987) (jury findings of antitrust violations and breach of contract); *Ustrak* v. *Fairman*, 781 F.2d 573 (7th Cir. 1986) (jury finding of racial discrimination); *Duckworth* v. *Franzen*, 780

F.2d 645 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 71 (1986) (jury finding of cruel and unusual punishment); *Gumz* v. *Morrissette*, 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986) (jury finding that defendants had used excessive force in plaintiff's arrest). The temptation, however, must be resisted and where a Court of Appeals not only succumbs but openly renounces the controlling principles, as happened here, it should be reversed and the verdict reinstated. Only in this way can the protections of the Seventh Amendment be preserved.

CONCLUSION

Petitioner accordingly requests that a writ of certiorari issue to review the decision of the Seventh Circuit, that the Seventh Circuit decision be reversed, and that the judgment of the district court be reinstated.

Respectfully submitted,

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Dated: September 4, 1987

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 86-2112 and 86-2176

SUSAN MARY NORRIS,

Plaintiff-Appellee, Cross-Appellant,

v.

WILLIAM W. WIRTZ, et al.,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 6836—**Susan Getzendanner**, *Judge.*

ARGUED FEBRUARY 23, 1987—DECIDED MAY 11, 1987

Before BAUER, *Chief Judge*, and CUDAHY and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* In 1967 and 1968 Susan Mary Norris, an adult beneficiary of her father's testamentary trust, consented to three sales of assets of the trust. On December 24, 1980, she filed this suit under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), arguing that her consent had been procured by fraud. We held in *Norris v. Wirtz*, 719 F.2d 256 (7th Cir. 1983), that the complaint stated a claim. A jury trial was held on remand, and the jury concluded that Susan Norris was the victim of fraud. The district judge fixed damages at more than $800,000. We conclude that the suit is barred by the statute of limitations.

The sales were arranged by William W. Wirtz, and each purchaser was a corporation in which he had an interest. The assets in question were James Norris's shares of stock in close corporations—St. Louis Arena Corp., Arena Bowl, Inc., and Judge & Dolph, Ltd.—which had been owned jointly by the Norris and Wirtz families. St. Louis Arena and Arena Bowl repurchased their own stock, paying cash to the Norris estate (which was holding the assets pending the funding of the trusts); Wirtz Corp. bought the Judge & Dolph stock on behalf of the Wirtz family. In each case the price was "book value", the corporation's accounting net worth divided by the number of shares outstanding; in no case was there an independent appraisal. William Wirtz had a conflict of interest because he was interested (as an investor in the buyers) in paying the lowest possible price, yet as Susan Norris's trustee and co-executor of James Norris's estate he was supposed to obtain the highest possible price. The corporations operate commercial businesses—St. Louis Arena Corp., for example, owns a large sports arena in St. Louis—so that the income stream is a more plausible starting point than the firm's book value as the basis of an estimate of worth.

Susan Norris knew these things or could have discovered them readily. The Wirtz family did not hide its interest in the corporations, and the Norris family well knew that the two families were the joint owners. The Wirtzes held their interest through Wirtz Corp., which owned most of the remaining stock in the three corporations, and in which William and his father Arthur M. Wirtz owned stock. The Wirtz family did not hide the nature of the companies or the lack of an independent appraisal; Susan Norris was given balance sheets, which were the sole stated basis of the valuation. The conflict of interest was apparent not only from the identity of the trustee but also from the language of James Norris's will, which appointed William Wirtz and Mary Norris, James's wife, as co-executors of the estate. (Because there are three Norrises—James, Mary, and Susan—and two Wirtzes—

William and Arthur—we use first names for everyone from here on.) The will ordered the executors to hold or liquidate the stock as prudent, recognizing that either could be "to the best interests of Arthur M. Wirtz, and his family members, as well as to my estate and the trusts created hereunder, for which reason the Trustee" was given broad discretionary powers. Susan had or readily could have had in 1967 copies of the will, lists of the investors in each corporation, and other documents. Although she was 18 in 1967 and the transactions were substantial—her interest in the residuary trust was worth more than $4 million—she did not ask for additional documents or seek professional advice. She signed, apparently without thinking, what William and Mary asked her to sign. (In the case of Judge & Dolph, her approval was oral or nonexistent; memories conflict.) She claims, and the jury must have found, that not until more than 10 years later were her eyes opened to the injury done her by payment for the stock at book value.

The district court asked the jury whether Susan had tarried too long. In framing the instructions, the district court started from the proposition that the Blue Sky law of Illinois supplies the statute of limitations, in this case the three years provided by Ill. Rev. Stat. ch. 121½ ¶137.13D. See *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir. 1984); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 125-27 (7th Cir. 1972). The court concluded that the running of the time may be postponed by equitable considerations, either fraudulent concealment or the fact that William was Susan's trustee. The court looked to state law to find tolling principles—despite the many holdings of this court that federal law supplies the tolling doctrines, see *Suslick*, 741 F.2d at 1004; *Parrent*, 455 F.2d at 128; *Goldstandt v. Bear, Stearns & Co.*, 522 F.2d 1265, 1268-69 (7th Cir. 1975); *Tomera v. Galt*, 511 F.2d 504, 509 (7th Cir. 1975)—and held that Susan's status as the beneficiary of a trust tolled the running of the statute until she learned (or in the exercise of due diligence could have learned) of the trustee's treachery.

Susan bore the burden of persuasion on these matters. E.g., *General Builders Supply Co. v. River Hill Coal Venture*, 796 F.2d 8 (1st Cir. 1986). The court rejected Susan's argument that only a declaration by the trustee that (a) he has committed a fraud, or (b) he is no longer serving as a trustee, would start the three-year period. The instructions to the jury accordingly called on it to determine whether Susan learned of the fraud before December 24, 1977, or, if she was put on inquiry before that date, whether she exercised due diligence but still could not discover the truth. The jury returned a single, special verdict to this compound question; it must have found that Susan neither knew of nor in the exercise of reasonable diligence could have discovered the fraud before the critical date.

On a post-trial motion for judgment notwithstanding the verdict, the district court concluded that although "there was much evidence that plaintiff did not act with due diligence" there was still enough evidence in Susan's favor to permit a rational jury to come to the conclusion it did. The defendants, who do not challenge the legal principles reflected in the charge to the jury, assert that the evidence of Susan's diligence is insufficient to support the jury's answer. Susan, however, defends her verdict on the theory that the time has yet to begin running, because William never announced his deceit. Susan claims that the law of trusts in Illinois supplies this tolling rule.

The view that state tolling rules apply when a federal court adopts a state statute of limitations has the support of *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86 (1980), and *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975), which seem dispositive. *Tomanio* and *Johnson* hold that when federal law incorporates state limitations law, it incorporates the whole law including tolling rules. Our earlier, contrary holdings were based on *Campbell v. Haverhill*, 155 U.S. 610 (1895), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). These cases refer to the role of state law without, however, distinguishing absorption of the period of limitations from selec-

tion of the commencement date; therefore they do not directly support use of a federal tolling rule, although they hint at one. Yet in *Suslick*, decided after *Tomanio*, we intimated that plaintiffs may have things both ways, saying at 741 F.2d at 1004 that a "federal doctrine of equitable tolling is available" in addition to the state doctrines incorporated under the authority of *Tomanio* and *Johnson*. (Mercifully, Susan does not ask us to "stack" tolling rules in this case, so we need not decide whether this is permissible.)

This is one tottering parapet of a ramshackle edifice. Deciding which features of state periods of limitation to adopt for which federal statutes wastes untold hours. *Tellis v. United States Fidelity & Guaranty Co.*, 805 F.2d 741, 747 (7th Cir. 1986) (Ripple, J., dissenting). Never has the process been more enervating than in securities law. There are many potentially analogous state statutes, with variations for different kinds of securities offenses and different circumstances that might toll the period of limitations. Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law, for help. E.g., Louis Loss, *Fundamentals of Securities Regulation* 1164-75 (1983); Thomas Lee Hazen, *The Law of Securities Regulation* §13.8 & n.2 (1985) (collecting authority); *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986). As the ABA's Committee on Federal Regulation of Securities observed, *id.* at 646-47, 656-57, the courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity and predictability to this field; we have vowed to stand pat rather than make things worse by exchanging one conflict for another. *Teamsters Local 282 Pension Trust Fund v. Angelos*, No. 86-1122 (7th Cir. Mar. 17, 1987), slip op. 6. Still, to the extent there is uncertainty about how to employ existing doctrines, we must take into account the interests of uniform application and the plan of the securities acts.

That plan called for uniform statutes of limitations *coupled with statutes of repose*. The Securities Act of 1933 gave the purchaser two years from the date of discovery of the fraud, but in no event more than 10 years after the sale. 48 Stat. 84 (1933). When Congress enacted the Securities Exchange Act of 1934, it amended this statute (§13, 15 U.S.C. §77m) and added a battery of new statutes of limitations, one for each of the express rights of action in the '34 Act. See §§ 9(e), 16(b), 18(c), and 29(b), 15 U.S.C. §§ 78i(e), 78p(b), 78r(c), and 78cc(b). The express periods added or amended in 1934 allow suit no later than one year after the plaintiff discovers the facts, and in no event more than three years after the transaction in question. (Section 16(b), 15 U.S.C. §78p(b), sets two rather than three years as the period of repose.) The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute. The ABA's task force concludes that it is "inescapable . . . that Congress did not intend equitable tolling to apply in actions under the securities laws." 41 Bus. Law. at 655. The legislative history supports this position. See H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 32, 36, 42 (1934); 78 Cong. Rec. 8198-8203 (May 7, 1934) (Senate amendments carried to the conference); and the principal exchanges during the Senate hearings, which are collected in 6 J.S. Ellenberger & Ellen P. Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934* 6565-66, 6718, 6993 (1973), and 7 *id.* at 7743-44.

The problem with this scheme—which would have cut off Susan's right to sue in 1970 and 1971—is that no one anticipated the development of "implied" rights of action. Because Congress did not provide for a private suit to enforce §10(b), it did not provide a corresponding statute of limitations. Although most statutes of limitations in the '33 and '34 Acts are 1-3 combinations (the shorter of one year from discovery, three years from the initial public

offering or other transaction), each applies to an associated express right of action. Thus when courts began to imply private rights of action from other substantive provisions, they did not find corresponding statutes of limitations. In accordance with long federal practice, they borrowed the statutes of limitations for "analogous" state law. Which state law, and with what tolling rules, has been nettlesome ever since.

As practitioners and scholars agree that the result is a mess, they also believe that the courts missed a turn. Courts should have drawn the periods of limitations for the implied rights from the periods of limitations for the express rights. Congress has not been silent about limitations for securities law in general, the usual problem that leads federal courts to turn to state law; it has been silent only with respect to rights of action it did not create. Whenever it created a federal right to sue, it also created a statute of repose no longer than three years. That is what the courts should have used. As Professor Loss puts it:

> This reference to state law makes for a great amount of utterly wasteful litigation. . . . Would it not be eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of private actions in securities cases than to a grab-bag of more or less analogous state statutes?

Fundamentals of Securities Regulation at 1168-69. Professor Hazen, and the ABA's task force, which collect still more views, are in accord. E.g.: "Against the clear evidence that Congress affirmatively intended that no tolling doctrine would be available for the express limitations periods for securities actions, it seems implausible that Congress intended such a doctrine to apply to the implied 10b-5 cause of action." 41 Bus. Law. at 655 (note omitted). The American Law Institute's *Federal Securities Code* §1727(b) and comment 3(b) (1980), which the Securities and Exchange Commission endorsed, came to

the same conclusion. See also *Sentry Corp. v. Harris*, 802 F.2d 229, 231 n.1 (7th Cir. 1986), looking longingly in this direction.

It is too late for an inferior federal court to turn back the clock, see *Angelos*, especially in a case in which the defendants did not request such a fundamental alteration of doctrine. *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1115-16 (1987). But it is timely yet to take account of the original plan in deciding how "liberal" the tolling rules should be, when existing precedent gives leeway. We should not forget that the securities laws do not admit of tolling, that there is a three-year statute of repose. The statute of repose is designed to deal with the problems of proof—and the invitation to file claims easier to advance than to refute—that arise if long-delayed litigation is permissible. This properly may inform the shaping of the implied rights of action. Cf. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-74 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735-49 (1975). We cannot overlook it here, for several of the participants died or lost their memories during the 19 years between the sales and the trial.

Susan wants us to incorporate into the tolling rules the doctrines of trust law dealing with beneficiaries' litigation against trustees. According to Susan, these doctrines in Illinois postpone the start of the period of limitations essentially until the trustee confesses his wrongdoing or repudiates his office. If this is indeed the law of Illinois for ordinary trust cases, a subject on which we express no opinion, it is not a tolerable rule for securities cases. It would move us farther from the plan of '34 rather than closer to it. It would excuse investors from all duty of inquiry, even after they have been put on actual notice that something is amiss. In many cases it would give investors a perpetual put or call, allowing them to speculate on the market without risk to themselves. Susan has not pointed to any opinion applying such a rule to a securities case. Illinois recently amended its securities law to en-

sure that it, too, contains a statute of repose.* We could not adopt the trusteeship tolling rules in securities law without effectively eliminating statutes of limitations for intra-family securities frauds. The rule of law applicable to this case therefore is, as the district court concluded, that the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit is based. The investor need not actually know the facts or appreciate their significance; the "could have discovered" branch of the test is objective. See *United States v. Kubrick*, 444 U.S. 111, 120-24 (1979); *Nemmers v. United States*, 795 F.2d 628, 631-33 (7th Cir. 1986). And whether the investor actually exercised diligence also is irrelevant. The question is not whether she did, but whether dili-

* An amendment to ¶137.13D effective January 1, 1986, provides that the plaintiff has three years from the date of the sale, "provided, that if the party bringing the action neither knew nor in the exercise of reasonable diligence should have known of any alleged violation . . . , the 3 year period provided herein shall begin to run upon the earlier of (1) the date upon which the party bringing such action has actual knowledge of the alleged violation of this Act, or (2) the date upon which the party bringing such action has notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of this Act; but in no event shall the period of limitation so extended be more than 2 years beyond the expiration of the 3 year period otherwise applicable." Defendants do not argue that this five-year statute of repose applies to Susan's case. They also do not contend that the three-year period applicable before January 1, 1986, was itself a statute of repose—although this is the interpretation given it in a gloss attached to the amendment. See Ill. Rev. Stat. ch. 121½ ¶137.13 at p. 118 (West 1986 Pocket Part): "Heretofore, the three-year statute of limitations could be an absolute bar to an action even if discovery was not reasonable or subverted." This suggests that Illinois has had a statute of repose all along, and that only the pre-*Tomanio* overlay of "federal" tolling doctrines has prevented its implementation. No matter what we make of this, the status of the law in Illinois hardly calls for expansive tolling in securities cases.

gence would have paid off. Failure to be diligent is no excuse, as *Angelos* holds.

The facts are largely undisputed, although the parties contest the inferences. Susan received balance sheets in 1967 showing how the price for the stock had been derived. She then had (or had access to) both her father's will and the identity of the investors in the three corporations. Neither Susan nor those with whom she dealt can remember what, if anything, she was told about the transactions beyond what appears in the documents. The balance sheets, coupled with the nature of the corporations, the lack of an independent appraisal, and William's conflict of interest, were the principal evidence that the defendants had defrauded Susan by representing (explicitly or implicitly) that the price was a realistic approximation of the stocks' value. Although Susan, only 18 at the time, did not appreciate what was going on and why an appraisal was called for, she was legally an adult and of sound mind. The statute begins to run when a reasonable person would have appreciated the need for further inquiry. An objectively reasonable person would have appreciated the need for further inquiry in 1967.

We recognize that *Suslick* and some earlier cases in this court hold that the time may be tolled "where the fraud goes undiscovered even though the defendant does nothing to conceal it." 741 F.2d at 1004; see also *Angelos*, slip op. 8-9 (collecting cases). None of our cases, however, and none of the state cases on which Susan relies, dealt with a deceit so easy to uncover from documents in hand. The language in *Suslick* addresses the situation in which one party tells a lie that is not discovered for a long time; that he did not tell a second lie to cover up the first does not necessarily mean that the statute commenced to run with the first; the clock does not start (under the tolling principles we adopted in earlier cases) until the defrauded investor knew the truth or was put on notice of the need for inquiry. When the defendant lies and the other party does not reasonably investigate, however, the time starts to run immediately, as *Angelos* holds. "[T]he plaintiff must

allege and prove that [she] remained unaware of the fraud 'without any fault or want of diligence or care on [her] part'." Slip op. 8. *Suslick* makes the same point, 741 F.2d at 1004. The documents handed to Susan in 1967, coupled with the identity of the trustee and the corporations in question, were enough to put a reasonable person on notice of the need for inquiry. Such an inquiry promptly would have turned up everything necessary to file a complaint.

We need not rest entirely on this. Even if Susan were so under the sway of William in 1967-68 that a reasonable person in her position would not have commenced an inquiry, by 1975 she was no longer so pliable. Susan was then emancipated and living in New Jersey. She hired Emil S. Cuccio, a lawyer, to investigate why she was receiving only $24,000 per year from the estate (the trusts were not funded until 1977) and why the Wirtzes were not giving the Norris family public credit for their ownership of the Chicago Black Hawks (a hockey team owned by the Wirtz family and James's estate); Susan also asked Cuccio to obtain for her employment with the Black Hawks. She testified that the Wirtz family had been putting her off, treating her as a child who was not entitled to explanations. She hired Cuccio to get explanations and results. No child, Cuccio was given access to every document he requested during the next two years. Among the documents he did *not* request were the papers concerning the stock sold in 1967 and 1968.

The parties have debated the scope of Cuccio's charge. Susan says that she hired Cuccio to look after her allowance, her employment, and her family's credit in Black Hawks programs. The defendants say that Cuccio had a general charge. We shall never know, for during both Susan's and Cuccio's depositions Susan's current lawyers objected (on grounds of the attorney-client privilege) to efforts to elicit the scope of Cuccio's employment. The district judge declined to compel Susan and Cuccio to answer the questions. But we do know that Cuccio's first letter to William Wirtz, dated January 20, 1976, stated:

"[O]ur client has authorized us to seek an inventory of assets of the estate as well as intermediate accountings prepared between the date of death of the Testator and the date of final settlement of the estate . . . . In addition thereto, with respect to the trust created by James D. Norris for the benefit of Susan Norris, our client desires an accounting of the principal and income derived from said trust from the date of death of her father up to and including the present time." This suggests a fairly broad charge. Cuccio represented Susan in all dealings with the Wirtzes from then through 1977, including their request that Susan approve the sale of additional stock in November 1977 to raise cash to pay the estate's taxes. William proposed that the estate sell the stock to the issuing corporation (controlled by Wirtz Corp.) at book value; Cuccio advised Susan that this was not an appropriate method of valuation and that an independent appraisal should be obtained. If the time starts to run as late as this advice, the suit is still untimely.

In November 1977 Susan knew that the method of valuation used in 1967 and 1968 was flawed. Since 1975 Susan had been dealing with William at arms' length. Susan's lawyer had a charge capacious enough to lead him to ask for all accountings of the estate and trusts. The parties agree that Cuccio received what he asked for. Like the district judge, we are flabbergasted that Cuccio never asked about the sales of assets or recognized the significance of making a Wirtz the executor of James's estate, with the conflicts that ensued. But all of this is unimportant. An expert's inattention or bad advice does not delay the time to sue. *Kubrick*, 444 U.S. at 124. As of 1975, when Susan hired Cuccio to deal with the Wirtzes, the question was whether Cuccio knew (or could readily have learned) enough to call for inquiry. The answer to that is yes, even resolving all doubt in Susan's favor. See *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213; *LaMontagne v. American Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

Cuccio knew that the Wirtzes were rebuffing Susan's inquiries; he must be charged with knowledge that the estate's assets were largely in closely held firms jointly controlled by the Wirtz and Norris families; he knew that the co-executor and trustee had a conflict of interest; he had to know (and Susan did know) that the estate sold assets to raise funds; and in November 1977 he was confronted with a proposal identical in all material respects to the three sales of 1967-68. Coupled with what Susan knew in 1967, Cuccio had enough to spark an inquiry, indeed to file this suit, in November 1977. Susan does not identify any event after 1977 that tipped her off; so far as we can tell, it simply took a long time for the available information to sink in (or for Susan to decide to act). Susan prevailed before the jury with little more than what was available in November 1977.

We are not anxious to set aside jury verdicts, especially after a judge with extensive experience in securities law has concluded that the evidence is sufficient—although, she believed, barely so. But our independent review of the record leads to a firm belief that by November 1977 Susan Mary Norris (in conjunction with Cuccio) knew the essential facts. That Susan may have forgotten things by 1977 is unimportant; a plaintiff's obliviousness may not be visited on the defendants. *Kubrick*, 444 U.S. at 124; *Nemmers*, 795 F.2d at 632. What Susan and Cuccio did not know, a modest inquiry would have unveiled. Unless lack of activity or perspicacity indefinitely postpones the start of the statute of limitations, Susan's time began running no later than November 1977, and it probably had lapsed before then. This suit is untimely, and the judgment is

REVERSED.

CUDAHY, *Circuit Judge*, dissenting:

The admittedly close question of the statute of limitations has gone to a properly instructed jury, which returned a special verdict for the plaintiff. An experienced trial judge has refused to set that verdict aside. Nothing cited by the majority justifies a different result here.

At the time of the fraudulent transactions, Susan Norris was an 18 or 19-year old girl. She was dealing with William Wirtz, who was both a trustee and a close family friend whom she had known all her life. William's father, Arthur, had been a business partner of Susan's father for many years. Susan "trusted Bill Wirtz and Arthur Wirtz and Ken Scanlon [the Wirtz lawyer] completely." The Wirtzes, apparently in line with their usual view of women's place, excluded Susan and her mother from any role in the businesses of which they were joint owners. Susan Norris claimed that she had never even heard of the three corporations in which she sold out her interests, in effect, to her trusted friends and fiduciaries. She had a high school education, no business experience, no personal attorney, no investment advisor and no stockbroker at the time of the sales. The jury could quite reasonably conclude that a person in Susan's position would not realize that book value is a very questionable measure of the worth of a firm. (Indeed, the defendants argued in the district court that book value was an accurate measure of the companies' worth.) The defendants did not even bother to obtain Susan's signature consenting to the 1968 transaction. Instead they merely told the court that all interested parties had "verbally approved" so that "no notice to any such interested person is expedient." There is really no plausible argument that Susan should have discovered the fraud before she hired her own attorney in late 1975.

There is also sufficient evidence in the record from which the jury could have concluded that Susan, even in the exercise of due diligence, could not have discovered the fraud in 1975 when she hired Cuccio. Susan claims that she did not turn to Cuccio out of some concern that she had been defrauded. At the time, her mother was in-

capacitated by illness and she was "feel[ing] very alone." As a woman, she had been excluded by the Wirtzes from the family businesses and "didn't really know what was going on." Although a letter written by Cuccio to William Wirtz in January 1976 suggests that Susan might have authorized Cuccio to examine past transactions, other evidence suggests that all of the tasks with respect to which Susan looked to Cuccio were forward-looking, relating to such matters as securing an increase in Susan's allowance and getting her a job with the Black Hawks. During the period Susan was represented by Cuccio, neither she nor Cuccio learned anything about the fraudulent 1967 and 1968 transactions. None of the properties involved was specifically mentioned in the Norris will, and Cuccio would not have been put on notice from that source. In addition, during the time Cuccio worked for Susan, the Wirtzes were still in a fiduciary relationship with Susan. Lacking actual knowledge, she should not be barred merely because her fiduciary was in a position to breach his trust. And there was nothing in the probate court records from which Cuccio could have suspected fraud in the 1967 and 1968 sales. One could go on citing evidence and circumstances which tend to support the jury verdict.

When an adolescent girl is allegedly defrauded by her trustee, who is also an old family friend and essentially a surrogate father, under circumstances like these, I see little reason to distrust the jury verdict. The jury had ample grounds for deciding as it did. Contrary to the approach taken by the majority, so long as there is sufficient evidence in the record to support the jury's verdict, it is not for this court to reweigh the evidence.

I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned Judge: SUSAN GETZENDANNER

* * *

Case Number: 80 C 6836
Date: June 3, 1986
Case Title: Norris v. Wirtz

* * *

DOCKET ENTRY:

1 ☐ Judgment is entered as follows:
2 ☒ [Other docket entry:]

Defendants' post-trial motions are denied. See reverse side.

* * *

[Reverse Side of Order]

ORDER

This securities fraud action is before the court on the defendants' motion for a new trial and for judgment notwithstanding the verdict. The court deferred ruling on these motions pursuant to the parties' request while settlement offers were being discussed. On May 1, 1986, the parties advised that no settlement was forthcoming soon, and the court agreed it would rule.

On re-examination of the papers, the court concludes that both motions should be denied. The court did not abuse discretion in its evidentiary rulings and the jury instructions, taken as a whole, were proper. In particular, several of the arguments made regarding damages were made to the court in post-verdict pre-judgment motions regarding plaintiff's standing to recover damages under

one of her trusts, and the court abides by the rulings which were entered at that time. The court further finds that the plaintiff's failure to specifically seek relief against Wirtz Corp. in the prayers for relief from the complaint do not justify releasing Wirtz Corp. from liability: Wirtz Corp. has been a defendant in this case since 1980, was represented in this case, and answered the complaint. The evidence, moreover, was such that the jury could have found that some of the Wirtzes' actions were in the scope of their authority as controlling shareholders and directors of Wirtz Corp. and the other closely held corporations such as would justify holding those corporations liable for the Wirtzes' acts in not disclosing material information to Susan Norris, a minority shareholder.

Regarding the motion for judgment notwithstanding the verdict, the court finds that the evidence was sufficient to support the jury's verdicts on the statute of limitations, the interstate commerce element on the three transactions, and the liability of Wirtz Corporation. Were this court acting as a juror, it might well have reached some different conclusions: there was much evidence that plaintiff did not act with due diligence in bringing suit and that William Wirtz was chiefly acting in his capacity as an executor and not a corporate agent regarding the claims in question. The evidence was not so one-sided, however, that reasonable minds could not disagree, nor was it so against the weight of the evidence as to require a new trial. Finally, there was more than sufficient evidence of interstate telephone conversations and use of the mails in connection with the transactions for which relief was sought.

Accordingly, the defendants' post-trial motions are denied in their entirety.

/s/ SUSAN GETZENDANNER

Sent for Microfilming : June 5, 1986

APPENDIX C

C-1

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 11, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

SUSAN MARY NORRIS,
Plaintiff-Appellee,
Cross-Appellant,

Nos. 86-2112 & 86-2176

v.

WILLIAM W. WIRTZ, et al.,
Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 C 6836

Susan Getzendanner, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 11, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

SUSAN MARY NORRIS,
Plaintiff-Appellee,
Cross-Appellant,

Nos. 86-2112 & 86-2176

v.

WILLIAM W. WIRTZ, et al.,
Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 C 6836

Susan Getzendanner, Judge

ORDER

Plaintiff-appellee, cross-appellant filed a petition for rehearing and suggestion of rehearing en banc on May 26, 1987. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and a majority of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Circuit Judge Cummings did not participate in the consideration of this case.

Supreme Court, U.S.
FILED
OCT 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUSAN MARY NORRIS,

Petitioner,

v.

WILLIAM W. WIRTZ, Individually, as Trustee, and as Executor of the Estate of ARTHUR M. WIRTZ, ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), requires a federal court to "borrow" a purported state trust law rule indefinitely tolling the statute of limitations, where the state would not apply the purported tolling rule to the "borrowed" limitations period and where the district court held that the purported rule did not correctly describe state law.

2. Whether the Seventh Circuit's use of the traditional standard of "reasonable diligence" in analyzing petitioner's claim that the statute of limitations should be tolled, a standard to which petitioner failed to object at trial or on appeal, creates a conflict among the Circuits meriting review by this Court.

3. Whether petitioner can raise in this Court a claim that the Seventh Circuit did not consider that the statute of limitations should be tolled because petitioner was a minor, when petitioner did not so argue at trial or on appeal, and when, even accepting petitioner's claim, she reached the age of majority over ten years before she filed suit.

4. Whether it violates the Seventh Amendment for a court of appeals to direct the granting of a motion for judgment notwithstanding the verdict.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

In compliance with Rule 28.1, the parent companies, subsidiaries (other than wholly owned subsidiaries) and affiliates of the corporate respondents are as follows: Forman Realty Corporation, American Mart Corporation, Bismarck Hotel Corporation, Chicago Stadium Corporation, N&W Corporation, Consolidated Enterprises, Inc., Chicago Blackhawks Hockey Team, Inc., Griggs Cooper Co., Longhorn Liquors, Inc., Wolverine TV Productions, Inc., Forman TV Productions, Inc., and Sportsvision, Inc.

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No. 87-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUSAN MARY NORRIS,

Petitioner,

v.

WILLIAM W. WIRTZ, Individually, as Trustee, and as Executor of the Estate of ARTHUR M. WIRTZ, ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

Petitioner is the daughter of James D. Norris, a business associate of Arthur Wirtz in several closely-held corporations. Upon Mr. Norris' death on February 12, 1966, his stock in three of those corporations, St. Louis Arena Corporation, Arena Bowl, Inc., and Judge & Dolph, Ltd., passed to his estate. The Wirtz Corporation, which was controlled by Arthur Wirtz, held the majority interest in

St. Louis Arena Corporation and Judge & Dolph, Ltd.; Wirtz Corporation and Mr. Norris each held 50% of the stock of Arena Bowl, Inc. (Tr. 145-46, 333; PX 101)[1]

Mr. Norris was survived by his wife, Mary, and by petitioner. In his last will, he appointed his wife and William Wirtz, Arthur Wirtz's son, as co-executors of his estate, and he made William Wirtz trustee of two testamentary trusts: a marital deduction trust in favor of Mary, and a residuary trust in favor of petitioner.[2] (PX 1) William Wirtz had been active in all the closely-held corporations operated by Arthur Wirtz and Mr. Norris, and he held beneficial interests in Wirtz Corporation. (Tr. 121)

Mr. Norris' will contained several provisions specifically mentioning the Wirtzes and the closely-held Wirtz-Norris corporations. The will expressly recognized that the estate would hold stock in "closely held corporations of which . . . Arthur M. Wirtz and/or members of his family and myself and/or members of my family, have joint ownership or control." The will granted the closely-held corporations and the shareholders of those corporations a right of first refusal upon any sale of the estate's stock in the corporations. Mr. Norris' will also contemplated an orderly liquidation of the stock in the "best interests of Arthur M. Wirtz, and his family members, as well as to my estate and the trusts created hereunder." Finally, the

---

[1] In this Brief, "Tr. ____" refers to the trial transcript; "PX ____" refers to petitioner's trial exhibits; "Pet. ____" refers to the Petition for Writ of Certiorari; "P. App. ____" refers to Petitioner's Appendix; and "R. App. ____" refers to Respondents' Appendix.

[2] The trusts were to be funded upon payment of the estate's federal tax obligations. (PX 1, p. 11) This did not occur until 1977, due to lengthy estate tax proceedings. Thus, all of the sales of stock at issue in this case were made by the co-executors before the trusts were funded.

will provided that William Wirtz's decision to sell the estate's interests in the closely-held Wirtz-Norris corporations "shall be final, binding and conclusive, and [William Wirtz] shall not be accountable to any present or future income beneficiaries for his action in the performance and the exercise of the powers and authorizations herein conferred upon [him]." (PX 1, pp. 10-14)

In September 1967, William Wirtz and Mary Norris, as co-executors, presented a petition to the probate court seeking approval of the redemption of the estate's shares of St. Louis Arena Corporation. (PX 301) On the same date, the co-executors petitioned for approval of the redemption of the estate's shares of Arena Bowl, Inc. (PX 401) Both petitions were signed and approved by Mary Norris, William Wirtz, and petitioner.[3] At the time, petitioner was 18 years old, an adult, and emancipated. (Tr. 1462, 1478)

Attached to the petitions were certified financial statements. (PX 302, 403A) The financial statements reflected that the proposed redemption prices were equal or nearly equal to the book value of the corporations' assets. In addition, the financial statement accompanying the St. Louis Arena Corporation petition stated that the corporation's sole shareholders were Wirtz Corporation and James D. Norris. (PX 302) The probate court approved the sales (PX 303, 402); the estate received nearly $2,700,000. Of this,

[3] At trial, petitioner identified her signature on both petitions. (Tr. 1431-32) She also testified, in substance, that she had seen the financial statements attached to the petitions. (Tr. 1475, 1513)

$1,600,000 was used promptly to pay the estate's initial federal and state death taxes.[4]

Approximately one year later, on September 27, 1968, the co-executors presented to the probate court a petition seeking approval for the sale of the estate's 8,625 shares of Judge & Dolph, Ltd. to Wirtz Corporation for $20 per share. (PX 101) The probate court order approving the sale recited that "all parties of interest have verbally approved the subject offer." (PX 102)

Petitioner was 19 years old at the time of the Judge & Dolph transaction. She testified that she had no memory with regard to the transaction. (Tr. 1436, 1486-87) William Wirtz testified that he had asked Mary Norris to request her daughter's approval and that Mary had later told him that petitioner approved. (Tr. 391-92) The attorney who drafted the petition testified that Mary Norris advised him sometime between the date of preparation of the petition and the date of the probate court hearing that petitioner had voiced her approval. (Tr. 572, 626) The estate received $172,500 for its Judge & Dolph stock.

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[4] Petitioner claims that the petitions "falsely stated . . . that the securities had to be sold to raise money for the payment of taxes when in fact there were liquid assets from which the taxes could have been paid." (Pet. 4) However, the case was not submitted to the jury on that theory. At petitioner's behest, the jury was instructed based solely upon the theory that defendants had misrepresented the value of the estate's stock. (Tr. 2100-01) Nor did petitioner ever contend, as the petition suggests (Pet. 5), that her claim was based in any way on the failure to appoint a guardian *ad litem* to represent her in the three transactions. Indeed, the undisputed evidence demonstrated that plaintiff was an emancipated adult at the time of the transactions. *See infra* at 18.

Over seven years later, during her mother's final illness in late 1975, petitioner hired a New Jersey attorney, Emil Cuccio. (Tr. 1348-49, 1520-21) Cuccio's January 20, 1976 letter to William Wirtz stated that petitioner had authorized him "to seek an inventory of the estate as well as intermediate accountings prepared between the date of death of the Testator and the date of final settlement of the estate," and that petitioner "desires an accounting of the principal and income derived from [her] trust from the date of the death of her father up to and including the present time." He offered to discuss "the position of [his] client" with William Wirtz "in the presence of the estate's attorneys." (PX 501) William Wirtz advised Cuccio in response that petitioner, and not the estate, would be required to pay Cuccio's fees. (Tr. 1557) Cuccio acknowledged this position but "reserve[d] the right to make such applications to the courts of Illinois . . . for any and all counsel fees and costs which may result from any issues subject to litigation in said forum." (PX 503)

Cuccio's January 20, 1976 letter also noted that he had reviewed James Norris' will. The will, as previously discussed, referred to the Wirtz-Norris companies and expressly contemplated both the sale of the estate's stock in those entities and purchase of the stock by the Wirtzes through their right of first refusal. (PX 1) Cuccio testified that he was aware that the will contained a discussion regarding the closely-held corporations. (Tr. 1353-54) He also testified that he realized that William Wirtz was operating under an apparent conflict of interest as co-executor of the Norris estate, as a result of his interests in the Wirtz-Norris corporations. (Tr. 1407)

Cuccio further testified that he was never refused any information by William Wirtz or Kenneth Scranton, the estate's attorney. (Tr. 1395, 1401) In addition, available to him as part of the public record of the probate court

proceedings were the petitions seeking approval for the three sales of stock, the financial statements attached to the petitions, and the probate court orders approving the sales.[5] Also available as part of the public record was the First Interim Account filed by Mary Norris and William Wirtz as co-executors, which disclosed the three sales and the sale prices.[6] Cuccio's awareness of the Accounts was demonstrated by the reference in his January 20, 1976 letter to "intermediate accountings."

In the autumn of 1977, Cuccio represented petitioner in connection with a proposed redemption of the estate's stock in another closely-held Wirtz-Norris concern. As was true of the St. Louis Arena, Arena Bowl, and Judge & Dolph purchases, the proposed 1977 purchase would have left Wirtz Corporation as the principal remaining shareholder. Indeed, the district court noted the striking similarity of the transactions. (Tr. 1002-06) Cuccio was, as demonstrated by his testimony, well aware of the problems inherent in valuation of the closely-held stock; he explained, in a meeting in November 1977, his belief that "the only way to determine the fair market value is by way of appraisal." (Tr. 1387-88)

Petitioner did not file her suit, however, until December 24, 1980, over thirteen years after the St. Louis Arena Corporation and Arena Bowl, Inc. transactions, five years

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[5] As the district court noted, "[i]t's hard to take over the representation of a beneficiary without reading the court file, and these petitions are in the court file." (Tr. 1761)

[6] Petitioner states that the three later Accounts filed by Mrs. Norris and Mr. Wirtz did not disclose any information concerning the three transactions. Under Illinois law in effect at the time, however, an executor was required to disclose in an Account only those receipts and disbursements that occurred subsequent to the previous Account. Former Ill. Rev. Stat. ch. 3, §289. Because the three transactions in question were disclosed in the First Account, the co-executors had no duty to disclose them in the later Accounts.

after hiring attorney Cuccio, and more than three years after the similar 1977 transaction. She maintained that respondents had misrepresented the value of the stock sold by the estate in the three transactions approved by the probate court in 1967 and 1968. The complaint in effect asserted that the unfairness of the prices was disclosed on the face of the probate court petitions, the balance sheets supporting the petitions, and the will, i.e., that the sales were self-dealing transactions made at the book value of the shares, a value which bears no relationship to "fair market price."

The parties agreed at all stages of the proceedings that the applicable statute of limitations was the three-year period supplied by the Illinois Securities Act. (Pet. 12) In petitioner's complaint, she attempted to excuse her delay by alleging that she had exercised due diligence in attempting to discover the facts which gave rise to her claims.

The case was tried before a jury in December 1985. By that time, Arthur Wirtz had died, and the memory of several of the other key witnesses had faded. The jury returned a verdict in favor of petitioner. The district court denied respondents' motion for judgment notwithstanding the verdict on the statute of limitations issue, though the court noted that as a finder of fact, "it might well have reached a different conclusion: there was much evidence that plaintiff did not act with due diligence in bringing suit." (P. App. B2)

The Seventh Circuit reversed. The court concluded that the applicable rule of law was, "as the district court had concluded, that the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit is based." (P. App. A-9) It held that, "even resolving all

doubt in [petitioner's] favor" (*id.* A-12), petitioner and her attorney Cuccio "knew (or readily could have learned) enough to call for inquiry" more than three years before petitioner filed suit. (*Id.* A-12, 13)

The court concluded initially that "[t]he documents handed to [petitioner] in 1967, coupled with the identity of the trustee and the corporations in question, were enough to put a reasonable person on notice of the need for inquiry," an inquiry that "promptly would have turned up everything necessary to file a complaint." (P. App. A-11) Alternatively, the court held that "[e]ven if [petitioner] were so under the sway of William [Wirtz] in 1967 that a reasonable person in her position would not have commenced an inquiry," petitioner could not rely on such an excuse as of 1975, when she hired Cuccio. (*Id.*) As of no later than November 1977, still more than three years before petitioner filed her lawsuit, Cuccio's independent knowledge, coupled with what petitioner had known since 1967, "was enough to spark an inquiry, indeed to file this suit." (*Id.* A-13) As the court concluded, "[t]hat [petitioner] may have forgotten things by 1977 is unimportant; a plaintiff's obliviousness may not be visited on the defendants." (*Id.* (citations omitted))[7] The court therefore held that respondents' motion for judgment notwithstanding the verdict should have been granted.

---

[7] Petitioner contends that the Seventh Circuit "totally ignored" petitioner's claim of fraudulent concealment by defendants. (Pet. 9) The claim was so spurious that not even the dissenting judge mentioned it. It is readily apparent that the court found the issue so insubstantial that it did not require comment.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

PETITIONER'S EQUITABLE TOLLING CLAIM IS BASED SOLELY UPON A DUBIOUS CONSTRUCTION OF ILLINOIS TRUST LAW THAT THE DISTRICT COURT AND COURT OF APPEALS PROPERLY REJECTED

The Seventh Circuit did not, as petitioner contends, "effectively hold that it will not apply state tolling principles in Rule 10b-5 litigation if to do so would allow the plaintiff to sue more than three years after the fraudulent transaction." (Pet. 11) Rather, the Seventh Circuit followed the rules set forth in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and applied the appropriate tolling rule. Petitioner focuses on *dictum* in the Seventh Circuit's opinion in the hope of creating an issue where none exists.

The parties have agreed at all stages of the proceedings (*see* Pet. 12) that the applicable statute of limitations was the three-year period supplied by the Illinois Securities Act (referred to by petitioner as the state's "Blue Sky Law").[8] *See* Ill. Rev. Stat. ch. 121½, §137.13D. Petitioner did not sue until 13 years after the initial sales of stock; she claimed, however, that the statute should be tolled. The threshold issue presented was, under *Tomanio*, one

[8] Petitioner suggests that the Court "should settle" whether the appropriate state statute of limitations to borrow in an action under Rule 10b-5 is that contained in the pertinent state's Blue Sky Law or instead in some other statute. (Pet. 20) That issue is not presented by this case, however, as the parties have *agreed* at all stages that the Illinois Securities Act supplies the applicable statute. Further, petitioner does not suggest any inter-circuit conflict on this point.

of Illinois law: what tolling rule applies to the statute of limitations contained in the Illinois Securities Act?

That issue of Illinois law remains the linchpin of petitioner's argument. She claims the benefit of a purported rule of Illinois trust law that she argues tolls the statute of limitations as to a trust beneficiary unless the trustee confesses his fraud or expressly repudiates the trust. (Pet. 12-14) Petitioner argues that this purported rule must, under *Tomanio*, be applied. If she is wrong in her view of Illinois law, however, petitioner's *Tomanio* argument must fail, for she does not (and has not at any time) urged the applicability of any alternative tolling rule other than that which the district court and Seventh Circuit applied.

Even were such an issue of state law worthy of this Court's consideration, petitioner's reading of Illinois law was squarely rejected by the district court. In a pretrial ruling, the district court "looked to state law to find tolling principles" (*see* P. App. A-3) and held that petitioner's "status as the beneficiary of a trust tolled the running of the statute until she learned (or in the exercise of due diligence could have learned) of the trustee's treachery." (*Id.*) As this Court has held, a federal district court's construction of state law is entitled to great weight. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203-04 (1956).

In accordance with its pretrial ruling, the district court instructed the jury that petitioner had the burden of proving that she "exercised reasonable care and diligence in seeking to learn the facts which gave rise to her claim but did not discover them prior to December 24, 1977." (Tr. 2103) *Petitioner interposed no objection to the court's instruction.*[9]

[9] The instruction that the district court gave closely paralleled an instruction tendered by petitioner. (R. App. 1, 2) Petitioner did

(Footnote continued on following page)

Despite her failure to object to the district court's tolling instruction, petitioner reasserted on appeal her claimed rule of Illinois trust law. As the court of appeals correctly noted, however, petitioner could not point to any authority in Illinois or elsewhere applying such a rule to a securities case.[10] (P. App. A-8)

Petitioner argues that the Seventh Circuit improperly drew its tolling rule from federal law. (Pet. 15) However, the Seventh Circuit applied the very same rule that the district court had held emerged from state law. Indeed, the Seventh Circuit expressly held that the district court had applied the correct rule: "*as the district court concluded*, . . . the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit was based." (P. App. A-9 (emphasis added)) Thus, irrespective of the derivation of the Seventh Circuit's rule, it is clear that the court upheld the district court's jury instruction, which itself was unquestionably based upon Illinois law, and applied the same tolling rule.

Petitioner claims, citing *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 328 (7th Cir. 1983), that the Illinois Securities

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[9] *continued*

not object to the tolling instruction or to the court's failure to give another instruction, tendered by petitioner, setting forth her purported rule of Illinois trust law. *See* Fed. R. Civ. P. 51.

[10] Petitioner asserts that the Seventh Circuit, in *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 356 (7th Cir. 1979), indicated that in a federal securities fraud case concerning a trust beneficiary, the purported trust-law tolling rule now advanced by petitioner must be applied. (Pet. 14) Petitioner's reliance upon *Nemkov* is misplaced. The court plainly did not decide whether that purported rule applies to securities fraud claims; rather, it simply noted that the plaintiff had so argued and then held, for other reasons, that the "rule" did not apply. This is far from acceptance of the rule or even an "indication" that it should apply in Rule 10b-5 cases.

Act "clearly embrace[s] tolling." (Pet. 17 n. 7) *Peoria Union* does not assist petitioner's cause, however, for the Illinois case that the Seventh Circuit cited for that proposition applied the same tolling rule used in the present case. In *Tarpoff v. Karandjeff*, 17 Ill. 2d 462, 162 N.E.2d 1 (1959), the Illinois Supreme Court stated that the statute of limitations "will not begin to run . . . until discovery of the fraud *or such time it should have been discovered if reasonable diligence had been exercised.*"[11] 162 N.E.2d at 5 (emphasis added).

In short, petitioner's argument that the Seventh Circuit did not apply Illinois law begs the question whether petitioner's claimed rule *correctly states Illinois law.* Stripped to its essentials, petitioner's quarrel with the decisions below is that they misconstrued the Illinois law applicable under the Illinois Securities Act. Even were petitioner correct, this Court does not sit to decide such state law issues.

Petitioner makes much of the Seventh Circuit's observation that rather than borrowing state statutes of limitation and tolling rules, "[c]ourts should have drawn the periods of limitations for the implied rights from the period of limitations for express rights," that is, the statutes of "repose" contained in those provisions of the Securities Exchange Act of 1934 that provide for express rights of action. (P. App. A-6) It is clear, however, that this is mere *dictum*; as the Seventh Circuit went on to note, "it is too late for an inferior federal court to turn back the clock." (*Id.* A-8)

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[11] Petitioner concedes that *Tarpoff* considered the issue "in a fiduciary context." (Pet. 17 n. 7)

The Seventh Circuit relied on its reference to "statutes of repose" only in declining to accept petitioner's argument that a trust beneficiary is, in a Rule 10b-5 case, entitled to a specialized tolling rule of indefinite length. The court stated that a rule that would permit a plaintiff to wait indefinitely before bringing suit, imposing no duty to exercise due diligence even if the plaintiff were on notice of facts indicating a possible claim, "is not a tolerable rule for securities cases," given Congress' limitation upon the application of tolling rules in express rights of action under the Securities Exchange Act. (P. App. A-8) As the Seventh Circuit correctly noted, petitioner's proposal "would excuse investors from all duty of inquiry, even after they have been put on actual notice that something is amiss." (P. App. A-8) In so stating, the Seventh Circuit did nothing more than follow this Court's directive that a federal court examine whether a state tolling rule that is to be "borrowed" comports with federal policy. *Tomanio*, 446 U.S. at 485; *Johnson*, 421 U.S. at 465. This Court need not reach this issue, however, as petitioner's proffered tolling rule has *no support* in Illinois law.

Petitioner's first argument is thus phrased disingenuously. The issue is not *whether* state tolling provisions should be applied in Rule 10b-5 cases; state tolling provisions in fact were applied by the district court, and the Seventh Circuit upheld the district court's rule. Rather, the issue is whether Illinois law would excuse a securities litigant from any duty to inquire merely because she is a trust beneficiary. Besides the fact that petitioner relies upon an unsupported, dubious, and rejected theory of Illinois law, she has demonstrated no conflict in the circuits on this question and no reason why such a singular and essentially local issue should occupy the attention of this Court.

II.

THERE IS NO CONFLICT IN THE CIRCUITS CONCERNING THE REASONABLE DILIGENCE STANDARD

The Seventh Circuit framed the applicable tolling rule as follows: "the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit is based." (P. App. A-9) The district court applied the same rule. (*Id.*) Now, for the first time, petitioner argues that the rule's traditional "reasonable diligence" prong should be excised because it conflicts with holdings from other circuits and "obliterates the significance of [petitioner's] . . . individual characteristics." (Pet. 21) This contention does not warrant review because it was not raised below and is entirely spurious.

Contrary to her present argument, petitioner agreed on appeal that the central inquiry was whether she "fail[ed] to act with reasonable care and diligence." (*See* Petitioner's Appeal Brief at 34) Furthermore, petitioner did not object to the trial court's use of the reasonable diligence standard in the instruction given the jury. That instruction stated that petitioner was required to "file suit within three years from the date when she knew or *should have known* of the facts which give rise to her claims" and that she bore the burden of proving that she "*exercised reasonable care and diligence* in seeking to learn the facts which gave rise to her claim." (R. App. 2 (emphasis added))

Having consented repeatedly to this formulation of the issue, petitioner cannot complain of it for the first time in this Court. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984). *See also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 244-45 (1985); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Miree v. DeKalb County*,

433 U.S. 25, 33-34 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n. 3 (1976).

Besides raising an issue she has waived, petitioner attempts to fabricate a circuit conflict where there is none. Contrary to petitioner's assertions, *no* court has disavowed the tolling doctrine's reasonable diligence prong, which petitioner calls "objective," nor has any court endorsed what she claims is a different, "subjective" inquiry reserved solely for the jury. Indeed, two purportedly distinct approaches do not even exist—the traditional reasonable diligence standard is applied uniformly.[12]

To support her contention, petitioner blatantly misconstrues the caselaw. For example, she states that in *Sperry v. Barggren*, 523 F.2d 708 (7th Cir. 1975), the Seventh Circuit "lined up on the 'subjective' side of the issue." (Pet. 21) This is simply not true. The court in *Sperry* expressly applied the reasonable diligence standard, stating that " 'the statute of limitations is tolled until the plaintiff has obtained knowledge of the fraud *or in the exercise of due care* should have obtained knowledge of the fraud.' " 523 F.2d at 710 (emphasis added) (quoting *Hochfelder v. Midwest Stock Exchange*, 503 F.2d 364, 375 (7th Cir.), *cert. denied*, 419 U.S. 875 (1974), and citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946) and *Baily v. Glover*, 88 U.S. (21 Wall.) 342, 347-48 (1875)). *Sperry* notes that the question of reasonable diligence ordinarily is for the jury. As in any other such inquiry,

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[12] Illinois also applies the traditional reasonable diligence standard. In *Tarpoff v. Karandjeff*, 17 Ill.2d 462, 162 N.E.2d 1, 5 (1959), a case petitioner uses to illustrate Illinois tolling principles (Pet. 17 n. 7), the Illinois Supreme Court held that in a fraud action, the statute of limitations is tolled "until discovery of the fraud or such time it should have been discovered if reasonable diligence had been exercised."

however, where the evidence is wholly insufficient the matter becomes one for the court.

Like *Sperry*, each and every one of petitioner's cases—as well as this Court—uses the traditional "reasonable diligence" standard. *See United States v. Kubrick*, 444 U.S. 111, 120-24 (1979) (applying reasonable diligence standard in the context of the Federal Tort Claims Act statute of limitations); *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171-72 (10th Cir. 1974); *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421, 1427 (S.D.N.Y. 1984); *Morgan v. Dain Bosworth*, 545 F. Supp. 953, 955 (D. Colo. 1982); *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402, 406 (D. Colo. 1979), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 540 (D. Md. 1978).

Indeed, in two of petitioner's cases, courts granted summary judgment to the defendants because, *as a matter of law*, the plaintiffs could not establish reasonable diligence. *See Lang*, 582 F. Supp. at 1427-28; *Peterson, Lowry*, 472 F. Supp. at 408-10. In all of the other cases cited by petitioner, the courts merely found in the context of summary judgment proceedings that a material issue of fact existed concerning reasonable diligence. *See Sperry*, 523 F.2d at 710; *Dzenits*, 494 F.2d at 172-73; *Kaufman*, 464 F. Supp. at 540; *Morgan*, 545 F. Supp. at 955-56. There is nothing in any of these cases that remotely suggests a circuit conflict over the viability of the tolling doctrine's reasonable diligence inquiry.

Petitioner further complains that the reasonable diligence standard applied by the Seventh Circuit obliterates the distinctions among plaintiffs. She is mistaken. The Seventh Circuit was not, as she claims, "blind" to her particular situation. Instead, as in any "objective" inquiry

into reasonableness, the relevant question is what a reasonable person would have done in the plaintiff's position, given the plaintiff's circumstances and knowledge. The Seventh Circuit has put it this way—"the plaintiff has a duty of diligence: it is not enough that he did not discover he had a cause of action, if a reasonable man *in his shoes* would have." *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983) (emphasis added).

Consistent with these principles, the Seventh Circuit in this case meticulously examined every relevant fact in evidence bearing on the issue, including the petitioner's age and sophistication, the information she and her lawyer possessed, and the existence of a fiduciary relationship. On these facts, the court determined that the evidence was insufficient to sustain the jury's finding that petitioner had acted with reasonable diligence. The court clearly evidenced its careful consideration of petitioner's situation: "[e]ven if Susan were so under the sway of William [Wirtz] in 1967-68 that *a reasonable person in her position* would not have commenced an inquiry, *by 1975 she was no longer so pliable.*" (P. App. A-11 (emphasis added)) There simply is no merit to petitioner's claim that the court was blind to her situation.

Petitioner attempts to conjure up confusion and conflict where there is none. The district court and the Seventh Circuit unquestionably applied the appropriate standard to the tolling question. Petitioner's misguided attack on this standard does not merit this Court's review.

III.

PETITIONER WAIVED ANY ARGUMENT THAT HER CHARACTERIZATION AS AN "ADULT" CONTRAVENED *STANTON v. STANTON,* 421 U.S. 7 (1975); THE SEVENTH CIRCUIT DID NOT RELY ON HER STATUS AS AN ADULT IN RENDERING ITS DECISION; AND SHE PROPERLY WOULD HAVE BEEN CONSIDERED AN ADULT UNDER ILLINOIS LAW IN ANY EVENT

Petitioner's claim that if she were "a male, the jury verdict in her favor would have been upheld by the Seventh Circuit" (Pet. 25) is preposterous, as any fair reading of the Seventh Circuit's opinion shows. Petitioner's attempt to seize upon one of numerous factors considered by the court in arriving at its decision is nothing more than an effort to conjure up an issue of constitutional dimension out of thin air. Petitioner waived this argument both in the district court and the court of appeals, having raised the point for the first time in her petition for rehearing. She cannot now claim to be aggrieved by her own failure to raise the question.

At trial, respondents offered, without objection or response, evidence that at the time of the transactions, petitioner was eighteen years old and emancipated from her mother. (Tr. 1462, 1478) In closing argument, respondents argued to the jury that petitioner was "18 years old. She's an adult in the eyes of the law." (Tr. 2023) Petitioner did not object to this statement or challenge it in her rebuttal argument.

Petitioner also sought no instruction on the question. The proposed jury instruction tendered by petitioner on the statute of limitations issue (*see* R. App. 1)[13] employed

[13] Petitioner's tendered instruction was not part of the record on appeal. The district court did not include the tendered instructions in the record as a matter of course, and, as petitioner did

(Footnote continued on following page)

the same standards that are applied to adults and made no reference to petitioner's now belatedly-claimed minority. Nor did petitioner object to the district court's jury instruction, which similarly did not make an adult-minor distinction. (*See* R. App. 2.)

Finally, petitioner made no response whatsoever to the statement in respondents' opening brief on appeal that at the time of the initial transactions, petitioner "was . . . 18 years old, an adult, and emancipated" (Resp. Appeal Brief at 6), other than to agree that petitioner was 18 years old at the time of the 1967 transactions. (Pet. Appeal Brief at 7) While petitioner argued that the fact that she was "a teenage girl" was a factor that the jury had taken into account (*id.* at 26), she did not argue that she was a minor in the eyes of the law, cite *Stanton*, or suggest that any special legal rules should apply to her due to her age.

This is a clear case of invited error. Petitioner's belated raising of the issue for the first time in her petition for rehearing, which the court of appeals denied without calling for a response, reveals that the issue is nothing more than an afterthought. Petitioner's reliance on *California Bankers Association v. Schultz*, 416 U.S. 21, 71 (1974) (*see* Pet. 26) is misplaced, for in *Schultz*, though the issue in question was not decided by the lower court, it had been argued before that court. *Schultz* does not hold that issues never raised at trial or on appeal may be argued in this Court.

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[13] *continued*
not object to the instruction actually given by the court, she did not request that her own instruction be included in the record. Because petitioner did not argue in her brief on appeal that she was *legally entitled* to special treatment because she allegedly was a minor, there was no occasion to make the tendered instruction part of the record. Should this Court grant *certiorari*, respondents will take the necessary steps to supplement the record.

Petitioner's argument is, in any event, meritless. Even were the three-year statute of limitations considered tolled until petitioner reached the age of 21, she did not file suit until ten years later. Petitioner does not argue that the knowledge that she had as a "minor" is to be ignored in determining whether the statute of limitations started to run after she reached the age of majority. Illinois law holds otherwise. *See Ikenn v. Northwestern Memorial Hospital*, 73 Ill. App. 3d 694, 392 N.E.2d 440, 444 (1979).

Further, the Seventh Circuit's holding does not hinge upon its initial conclusion that the statute of limitations began to run in 1967-68, at the time of the transactions.[14] As the court stated:

> We need not rest entirely on this. Even if Susan were so under the sway of William in 1967-68 that a reasonable person in her position would not have commenced an inquiry, by 1975 [at age 26] she was no longer so pliable. Susan was then emancipated and living in New Jersey. She hired Emil S. Cuccio, a lawyer . . . . She testified that the Wirtz family had been putting her off, *treating her as a child* who was not entitled to explanation. She hired Cuccio to get explanations and results. *No child*, Cuccio was given access to every document he requested during the

[14] Further, the Seventh Circuit analyzed petitioner's conduct in 1967 based upon the fact that she was 18 years old, not that that made her an "adult" under Illinois law. The court observed that "[a]lthough she was 18 in 1967 and the transactions were substantial—her interests in the residuary trust was more than $4 million--she did not ask for additional documents or seek professional advice. She signed, apparently without thinking, what William and Mary asked her to sign." (P. App. A-3) Though petitioner claimed virtual amnesia about the events of 1967, the court stated that "the documents handed to Susan in 1967, coupled with the identity of the trustee and the corporations in question, were enough to put a reasonable person on notice of the need for inquiry. Such an inquiry promptly would have turned up everything necessary to file a complaint." (P. App. A-11)

> next two years. Among the documents he did not request were the papers concerning the stock sold in 1967 and 1968.

(P. App. A-11 (emphasis added)) Quite apart from the question of when petitioner reached her majority, it is abundantly clear that the Seventh Circuit rested its decision on the independent basis of petitioner's lack of diligence when she was 26, with legal counsel at her side. The undisputed evidence was that all of the documents used by other lawyers to file suit in December 1980 were clearly available to attorney Cuccio: "[a]s of 1975, when Susan hired Cuccio to deal with the Wirtzes, the question was whether Cuccio knew (or could readily have learned) enough to call for inquiry. The answer to that is yes, even resolving all doubt in Susan's favor." (P. App. A-12)

Finally, had petitioner raised the issue of when a child reaches adulthood, and had the Seventh Circuit considered the point significant, the issue would not have been resolved as petitioner now suggests. It is clear that Illinois would have equalized the age of majority at 18, not 21. In *Munck v. Munck*, 62 Ill. App. 3d 223, 378 N.E.2d 1252 (1978), which concerned when a father's support obligations end, the court ruled that the age of majority after *Stanton v. Stanton*, 421 U.S. 7 (1975), was 18 for both males and females. Following this Court's decision in *Stanton II* (*Stanton v. Stanton*, 429 U.S. 501 (1977)), the court took note of the 1971 amendment to the Illinois majority statute, which equalized the age of majority at 18, and "read the amendment as an expression by the legislature that the public policy of Illinois is to treat both males and females as adults at the age of 18." 378 N.E.2d at 1255.

In *Munck*, the court distinguished its earlier decision in *Jeschke v. Ruhlow*, 59 Ill. App. 3d 125, 376 N.E.2d 15 (1978), the case upon which petitioner relies. It observed

that in *Jeschke*, it had not decided the question of equalizing ages, but rather determined only whether a specific statute barred a cause of action. *Munck*, 378 N.E.2d at 1255. That statute required a personal injury suit to be filed within two years from the time the plaintiff reached "the age of 21 years, or if a female, the . . . age of 18 years." In *Jeschke*, the court held that a lawsuit filed by a female within two years of the effective date of the legislature's equalization of the age of majority at 18 was timely. *Jeschke*, 376 N.E.2d at 17.

The peculiarities of such a statutory bar are not involved in this case. Rather, the issue is whether the statute of limitations, which had run, was tolled by equitable considerations. Nothing in *Jeschke* suggests that in the context of equitable tolling, an Illinois court would have, given the legislature's equalization of the age of majority at 18, either considered an 18 year old female to be a minor or disregarded the knowledge of her claim that a female acquired while age 18 or 19. In short, petitioner reads *Jeschke* too broadly. *Jeschke* does not, as petitioner claims, "equalize[ ] the age of majority at age 21 for statute of limitations purposes" (Pet. 25), and it does not control this case.

For these reasons, the premise of petitioner's argument—that the lawsuit of a male plaintiff in her position would have been found timely by the Seventh Circuit—is incorrect.

In sum, petitioner never argued that she was a child or claimed that she was entitled to special treatment because she was a child. The Seventh Circuit's judgment that petitioner failed to exercise due diligence clearly was determined independent of the question of her adulthood at the time of the transactions. Had petitioner bothered to raise the question, the answer would have been that

she was an adult in the eyes of Illinois law both before and after *Stanton.*

IV.

THE SEVENTH CIRCUIT USED THE CORRECT STANDARD IN REVIEWING THE JURY VERDICT

Appellate courts, no less than trial courts, are empowered to issue judgments notwithstanding the verdict. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967). When urged to issue a judgment notwithstanding the verdict, a court must view the evidence in a light most favorable to the non-moving party and should grant the judgment when "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F.2d 163, 167-68 (7th Cir. 1980). The Seventh Circuit clearly stated that it was doing precisely that when, after "resolving all doubts in [petitioner's] favor," it reversed the verdict because there was insufficient evidence to support the jury's finding on reasonable diligence. (P. App. A-4, A-12) In doing so, the court expressly relied on *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir. 1985) and *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984), both of which use the standard quoted above. (P. App. A-12)

Petitioner now claims that the Seventh Circuit applied a different standard of review, relying solely on the court's statement that it conducted an "independent review of the record." (P. App. A-13) Petitioner takes out of context what obviously was nothing more than the court's assurance that it carefully examined the record before

issuing its decision. Indeed, the court's evident attention to the record is the hallmark of effective appellate review, rather than, as petitioner warns, a nefarious scheme to undermine jury verdicts that will "spread[ ] to other Circuits as well." (Pet. 29)

In point after point, the Seventh Circuit stressed that it was faithful to the judgment n.o.v. standard. At the outset, the court explained that the question was the sufficiency of the evidence before the jury. (P. App. A-4) It noted that the relevant facts were largely undisputed, and that the parties had agreed on one key fact—that petitioner's attorney was given all information he asked for. (*Id.* A-10, A-12) More importantly, the court resolved all doubt in petitioner's favor and still determined that she, and her attorney, failed to exercise reasonable diligence. (*Id.* A-12) The court explained that although it was not eager to set aside a jury verdict, it had no choice because the evidence was simply insufficient. (*Id.* A-13) There was nothing extraordinary about the court's review.

Finally, petitioner attempts to fashion a constitutional deprivation out of the Seventh Circuit's careful review. This Court previously has determined that judgments notwithstanding the verdict do not violate the Seventh Amendment, whether issued by a trial or an appellate court. *See Neely*, 386 U.S. at 322; *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659-60 (1935). In light of the appellate court's strict adherence to the appropriate standard of review, the petitioner's rights were fully preserved. Her constitutional claim does not merit review in this Court.

CONCLUSION

For the reasons stated above, respondents request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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RESPONDENTS' APPENDIX 1

Plaintiff's Proposed Jury Instruction No. 36

The defendants contend as an affirmative defense that, even if the plaintiff establishes all the elements of her Rule 10b-5 claim, plaintiff's recovery is nonetheless barred because of the statute of limitations. The statute of limitations would bar the plaintiff's claims only if she failed to file her lawsuit within three years after the point in time at which she actually learned of the fraud or learned of facts which would put a reasonable person on notice of the alleged fraud. However, the statute of limitations is not available as a defense if you find either:

(a) that plaintiff did not actually discover the fraud which she alleges was perpetrated by the defendants prior to December 24, 1977, because the defendants took affirmative steps to conceal them; or

(b) that plaintiff did not actually discover the alleged fraud prior to December 24, 1977 even though she exercised reasonable care and diligence under the circumstances in seeking to learn facts which would have disclosed the alleged fraud.

I further instruct you that the presence of a fiduciary relationship between a plaintiff and a defendant bears heavily on the issue of whether the plaintiff exercised reasonable care and diligence in seeking to learn facts which would have disclosed an alleged fraud. A beneficiary of a trust has no affirmative duty to investigate the conduct of the trustee. Other factors which you may take into consideration in deciding whether the plaintiff exercised reasonable care and diligence include the plaintiff's opportunity to detect the fraud, and the plaintiff's sophistication and experience or lack of sophistication and experience.

RESPONDENTS' APPENDIX 2

District Court's Jury Instruction Concerning Statute Of Limitations And Tolling

The plaintiff filed her complaint on December 24, 1980. The law requires that Susan Norris file suit within three years from the date when she knew or should have known of the facts which give rise to her claims. Accordingly, as to each claim the plaintiff has the burden of proving by a preponderance of the evidence as to a particular defendant,

(a) that plaintiff did not actually discover the facts which gave rise to her claim prior to December 24, 1977, because the defendant took affirmative steps to conceal those facts; or

(b) that plaintiff exercised reasonable care and diligence in seeking to learn the facts which gave rise to her claim but did not discover them prior to December 24, 1977.

In determining whether the plaintiff exercised reasonable care and diligence in seeking to learn the facts which give rise to plaintiff's claims, you may consider the presence of a fiduciary relationship between the plaintiff and a defendant. A beneficiary of a fiduciary relationship is entitled to rely in the fiduciary's continued acknowledgement and performance of his fiduciary duties as evidence that no wrongdoing has occurred. Whether or not the plaintiff continued to rely on any fiduciary is a question of fact for you to decide. Moreover, a plaintiff is not entitled to so rely on a fiduciary relationship once she learns of facts which would put a reasonable person on notice of possible claim.

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.

No. 87-389

In The Supreme Court of the United States

October Term, 1987

SUSAN MARY NORRIS,

Petitioner,

v.

WILLIAM W. WIRTZ, Individually, as Trustee, and as Executor of the Estate of ARTHUR M. WIRTZ, ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. THE LOWER COURTS DID NOT APPLY STATE TOLLING PRINCIPLES, AND PETITIONER DID NOT WAIVE HER OBJECTION TO THE DISTRICT COURT'S REFUSAL TO DO SO.

Although the respondents characterize the rulings below rejecting the use of state tolling principles in Rule 10b-5 litigation as involving merely a "local issue" (Br. in Opp. 13), the Court of Appeals endorsed the critical importance of the issue in its "plea for help" to this Court in this "vexing" area. (App. A-5) Respondents do not deny the existence of the confusion and conflicts. According to respondents, however, the Court of Appeals simply applied *Illinois* tolling principles, *sub silentio*, by approving the district court's jury instruction. Respondents also suggest that petitioner waived her contention that Illinois tolling principles should be applied. Both of these contentions are without merit.

We deal first with the "waiver" contention. Before the trial began, Susan Norris urged the district court to rule the limitations issue out of the case because, under the Illinois tolling principles protecting trust beneficiaries, the statute of limitations did not begin to run until the trust terminated or William Wirtz "repudiated" the trust, neither of which events had occurred. (R. Item 98 at 6) In her pretrial ruling (R. Item 102) the district court rejected petitioner's view and held, pursuant to federal law,[1] that the limitations issue should be decided by the jury under a due diligence standard.

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[1] The "applicable Seventh Circuit precedent" applied by the Court consisted of *Tomera* v. *Galt*, 511 F.2d 504 (7th Cir. 1975), and *Goldstandt* v. *Bear, Stearns & Co.*, 522 F.2d 1265 (7th Cir. 1975). (R. Item 102 2-3) *Tomera*—decided before this Court's rulings in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975)—continued to apply the old rule that tolling was to be determined in accordance with *federal* common law. *Tomera*, 511 F.2d at 809. *Goldstandt* simply incorporated the (federal) test from *Tomera*. *Goldstandt*, 822 F.2d at 1268.

(Footnote continued on the following page)

Despite the district court's disagreement with her view, petitioner tendered a jury instruction, again suggesting the applicability of the same Illinois trust beneficiary tolling principle.[2] The district court rejected it. Petitioner also submitted an *alternative* general instruction, applicable to the defendants *other than* the trustee William Wirtz, which, after setting forth the fraudulent concealment and reasonable diligence standards, would have instructed the jury that "a beneficiary of a trust has no affirmative duty to investigate the conduct of the trustee." The district court rejected this instruction as well. The instruction actually given omitted this statement.

On appeal, petitioner again argued that the instruction given was excessively favorable to the Wirtzes but that the evidence sustained the verdict even under the wrong standard. The Wirtzes did not argue in the Court of Appeals that there had been any "waiver" by petitioner in the district court.

Obviously, there *was* no "waiver" here. Under Rule 46 of the Federal Rules of Civil Procedure, no formal exception is necessary so long as the court is put on notice of the

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1 *(Continued)*

The source of law governing tolling changed with *Johnson* and *Tomanio*, a change which was recognized in the Seventh Circuit with *Suslick* v. *Rothschild Securities Corp.*, 741 F.2d 1000, 1005 (7th Cir. 1984). It is true that the district judge in her pretrial ruling mentioned the *Suslick* rule requiring application of state law. (R. Item 102 at 2) But her subsequent reliance on the *Tomera* and *Goldstandt* cases and her rejection of Illinois tolling law relating to trustees show that her reliance was on *federal* law.

[2] Plaintiff's Requested Instruction No. 37, expressly applicable to "William Wirtz in his capacity as trustee," would have instructed that the trustee "may not assert the statute of limitations defense . . . as a matter of law." Moreover, defendants' assertion (Br. in Opp. 10) that the instructions given "closely paralleled" an instruction given by plaintiff is misleading. That requested instruction, No. 36, was only applicable to the defendants whom the jury might have found not to have been fiduciaries at all.

party's position; it is not necessary to antagonize the court with repeated objections to an adverse ruling. *Pierce* v. *Ramsey Winch Co.*, 753 F.2d 416, 424 (8th Cir. 1985); *Transcontinental Leasing, Inc.* v. *Michigan National Bank of Detroit*, 738 F.2d 163, 167 (6th Cir. 1984); *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 123 (2d Cir. 1973), *cert. denied*, 414 U.S. 857. Here, petitioner's proposal had been fully briefed, had been twice rejected by the district judge and, on reassertion in the Seventh Circuit, was rejected there as well. No further "objection" was required.

It is preposterous for respondents to argue that the Court of Appeals applied its own view of Illinois state tolling principles. In fact, the Court of Appeals went to great lengths to reject the application of such principles because they provided no period of "repose." (App. A-5 and A-6) The Court of Appeals specifically disclaimed any intention of applying state tolling law, on which it "expressed no opinion." (App. A-8) However, there was no dispute as to what the Illinois trust tolling principles were, for the Seventh Circuit had itself set them forth in *Jefferson National Bank* v. *Central National Bank in Chicago*, 700 F.2d 1143 (7th Cir. 1983). Respondents do not, of course, contend that *Jefferson National* is an incorrect statement of Illinois law. The Court of Appeals simply refused to apply *Jefferson National* here because this is a Rule 10b-5 case and because the application of the Illinois rule would eliminate the "repose" which purportedly was part of the Congressional "plan" under the Exchange Act of 1934. When the Court of Appeals approved that part of the district court's view which stated the "reasonable diligence" standard, it was obviously employing the federal tolling doctrine, not the state tolling law, which it had expressly rejected in the preceding sentence. (App. A-3) Thus, the Court of Appeals was well aware of the significance of its ruling. Its rejection of state tolling principles in Rule 10b-5 cases is hardly a "local issue" or mere "dictum." It is an attempt by the majority to superimpose a period of "repose" upon the tolling rules for Rule 10b-5 cases.

Respondents also misstate the tolling issue in arguing that petitioner cited no Illinois decision applying the Illinois trust tolling principles in a case under the Illinois Securities Law. This Court's decisions require use of state tolling principles which emanate from the status of the plaintiff such as infancy, imprisonment, incompetency and fiduciary relationship. *Robertson* v. *Wegmann*, 436 U.S. 584 (1978); *Johnson*, *supra*, 421 U.S. at 464; *Barney* v. *Oelricks*, 138 U.S. 529 (1891). The Illinois trust tolling principle is just such a rule. There is no reason to conclude, and certainly no Illinois case holding, that Illinois courts would not apply it in an action under the Illinois Blue Sky Law. Therefore, under *Tomanio*, *supra*, and *Johnson*, *supra*, the federal courts must apply it in a Rule 10b-5 case.

II. THE FEDERAL EQUITABLE TOLLING DOCTRINE IN 10b-5 CASES IS NOT BLIND TO THE INDIVIDUAL CIRCUMSTANCES OF INVESTORS.

Respondents seriously distort the petitioner's position, and the body of precedent in the circuits, concerning the split over the "objective" and "subjective" versions of the federal tolling doctrine. The split does not consist of differences over the verbal formulation of the "reasonable care" standard but as to whether that standard takes into account the age, sophistication and beneficiary status of the buyer or seller of securities who has been defrauded in violation of Rule 10b-5.

Despite respondent's efforts to brush it aside, it is certain that such a split does exist and that it has compounded the uncertainty and confusion in Rule 10b-5 tolling law. The *Report of the Task Force on Statute of Limitations for Implied Actions* of the ABA's Committee on Federal Regulation of Securities, citing the cases discussed in the Petition, states:

> The equitable tolling doctrine itself is applied differently by the various circuit courts of appeals. Some courts consider that the extent of a plaintiff's obligation to discover the facts of the

> fraud against him should be determined subjectively, taking into account such factors as an individual's unusual sophistication. Other courts apply an objective standard, requiring the plaintiff to exercise that degree of diligence which a reasonable person could or would use. Because disparate standards may be applied by different courts and to different plaintiffs, it is impossible to predict when a cause of action arising out of a particular transaction will be finally barred. 41 Bus. Law. 645, 654-55 (1986).

In *Sperry* v. *Barggren*, 823 F.2d 708 (7th Cir. 1978), the Seventh Circuit included within the "reasonable care" standard the specific circumstances in which the plaintiff finds himself or herself, including a fiduciary relationship. Here the Seventh Circuit cast this approach aside and mentioned the plaintiff's specific circumstances, including her age and beneficiary status, only to reject their significance. Any fair reading of the Seventh Circuit's opinion shows that Susan Norris was held to a so-called "objective" standard under which she was charged with the duty to tell her lawyer Cuccio, years later, things that an 18-year-old could neither have known nor understood in 1967-1968. Thus, the Seventh Circuit holds:

> Although Susan, only 18 at the time, did not appreciate what was going on and why an appraisal was called for, she was legally an adult and of sound mind. The statute began to run when a reasonable person would have appreciated the need for further inquiry. *An objectively reasonable person* would have appreciated the need for further inquiry in 1967. (App. A-10).

It is this use of a purportedly "objective" tolling test which the Court of Appeals uses to set aside the jury verdict by concluding that Susan Norris, who had access to exactly the same information as the probate judge, and no more, should have suspected fraud when he did not.

In resolving the uncertainty in the current law of Rule 10b-5 tolling, as reflected in the Seventh Circuit's "plea for help" in this case, this Court should hold once and for all

that the federal tolling doctrine, if applicable at all, must consider the real world circumstances in which the plaintiff is placed. Here, the test is whether a reasonable 18-year-old trust beneficiary with a high school education was put on notice of facts suggesting that her trustee, her father's best friend, might have defrauded her. No rational jury could have so concluded.

III. PETITIONER DID NOT "WAIVE" HER RIGHT TO EQUAL PROTECTION.

Respondents argue that Susan Norris "waived" her right to be treated the same as a male for purposes of determining whether she was "legally an adult" under Illinois law. Thus, respondents seek to excuse the Court of Appeals' failure to honor the mandate of *Stanton* v. *Stanton*, 421 US. 7 (1975), and the clear directive of the Illinois court in *Jeschke* v. *Ruhlow*, 59 Ill.App.3d 125, 376 N.E.2d 15 (1978), that females are not to be treated as adults at age eighteen for limitations purposes when males would not be.

Respondents do not argue that the Illinois Probate Act provision creating different majority ages for males and females was constitutionally valid. Under *Stanton*, it obviously was not.

Susan Norris would not be held to have "waived" her equal protection right unless that waiver was, "at the very least, clear," *Fuentes* v. *Shevin*, 407 U.S. 67, 95 (1972).[3] Here, petitioner took no act of any kind to even hint at waiver. Her "failure to object" to one-sentence statements in the closing argument of respondents' counsel and in the respondents' brief on appeal hardly amounts to a "clear waiver," nor do they show that plaintiff even

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[3] This Court has held that "clearly" is the *minimum* standard for waiver, but has left open whether the test should be the stronger one of "voluntarily, intelligently and knowingly made,"*Fuentes*, *id.* at 94; *see also K.M.C. Co., Inc.* v. *Irving Trust Co.*, 757 F.2d 752, 755-57 (6th Cir. 1985). Of course, there is nothing in the present case which comes even close to meeting either standard.

understood that a right of any kind was purportedly being waived. Nor was she required to submit a jury instruction to preserve her constitutional right. Of course, she *prevailed* before the jury on the instruction actually given.

The constitutional violation of making Susan Norris' "childhood" dispositive of the limitations issue did not emerge in this case until the majority issued its opinion. Significantly, respondents cite not a single authority for their argument that Susan Norris "waived" her constitutional right to equal treatment under *Stanton* and *Jeschke*.

Respondents also say (Br. in Opp. 20) that "petitioner does not argue that the knowledge that she had as a 'minor' is to be ignored in determining whether the statute of limitations started to run after she reached the age of majority." Petitioner *has* so argued, both here and in her petition for rehearing in the Court of Appeals. It was clearly inappropriate for the Court of Appeals to apply an "objective" standard of due diligence based upon the assumption that a *child* acquired "knowledge" concerning book values, independent appraisals and conflicts of interest on the part of her trustee. It is equally inappropriate to assume such knowledge for the subsequent period 1975-1977, when Susan Norris was an adult, for the majority as to that period imposes upon her the obligation to remember, and impart to her lawyer Cuccio, facts she supposedly learned *as a child*.

Respondents also say that Illinois law "holds" that "knowledge acquired by a child is not to be ignored in determining when the statute begins to run, citing *Ikenn* v. *Northwestern Memorial Hospital*, 73 Ill.App.3d 694, 392 N.E.2d 440 (1979). The *Ikenn* case does not state such a rule but holds simply that a child born blind should have realized some time before his twenty-first birthday that his blindness was wrongfully caused. *Ikenn* was a personal injury suit, not a case in which the plaintiff was fraudulently induced, while still a child, to enter into a complicated securities transaction. Under Illinois law, the contracts of a child are voidable after he or she reaches major-

ity and any subsequent ratification must be based on full knowledge of the facts, especially where there is a trustee-beneficiary relationship. See, *e.g.*, *Swiney* v. *Womack*, 343 Ill. 278, 175 N.E. 419 (1931).

Thus, while it is true that the Court of Appeals rested its limitations holding on two different periods, 1967-1968 and 1975-1977, *both* holdings are infected by the majority's failure to follow *Stanton*.[4]

IV. RESPONDENT'S BRIEF CONTAINS NUMEROUS FACTUAL INACCURACIES.

Respondent's "Statement of the Case" contains numerous factual inaccuracies and distortions which require correction here. They include the following:

1. "Attached to the petition [presented by the Wirtzes to the probate court] were certified financial statements. (PX 302, 403A). The financial statements reflected that the proposed redemption prices were equal or nearly equal to the book value of the corporations' assets." (Br. in Opp. 3) In fact, the financial statements did not even mention the prices, let alone describe how the prices were arrived at. (PX 302, 403A) In order to know how the prices were arrived at, Susan Norris at age 18 would have had to subtract the liabilities from the assets and divide by the number of shares in order to arrive at the "book value" per share and then compare that number with the price. The assets were carried at cost on the financial statements, and neither the petition, nor the financial statements, nor any other document shown to Susan Norris or to the probate judge, disclosed that those cost figures were substantially less than the fair market value of the corporate assets. Professional real estate and stock appraisals were necessary to

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[4] Respondents also contend that "Illinois would have equalized the age of majority at 18, not 21." This speculative assertion is unsupported by any authority. Certainly *Munck* v. *Munck*, 62 Ill.App.3d 223, 378 N.E.2d 1252 (1978), does not support it, for that case was limited to child support and leaves *Jeschke* intact for limitations purposes.

demonstrate the discrepancy.

2. "Cuccio's January 20, 1976, letter also noted that he had reviewed James Norris' will. The will, as previously discussed, referred to the Wirtz-Norris companies and expressly contemplated both the sale of the estate's stock in those entities and purchase of the stock by the Wirtzes through their right of first refusal. . . ." (Br. in Opp. at 5) In fact, the will did *not* mention the three companies whose stock was sold in 1967 and 1968. (PX 1)

3. "Cuccio further testified that he was never refused any information by William Wirtz or Kenneth Scranton, the estate's attorney." (Br. in Opp. at 5) In fact, Cuccio testified that, while he was not "refused" any information, Scranton failed to provide him with certain information which he requested, including the Fourth and Final Account. (Tr. 592, 1403)

4. "In addition, available to him as part of the public record of the probate court proceedings were the petitions seeking approval for the three sales of stock, the financial statements attached to the petitions, and the probate court orders approving the sales. . . ." (Br. in Opp. 5-6) In fact, no financial statements for Judge & Dolph were submitted to the probate judge, and the statements of the St. Louis Arena Corporation were missing from the court file. (PX 101, 401, Tr. 556) The Arena Bowl financials did not disclose that Wirtz Corporation, upon redemption, would be the sole remaining shareholder. (PX 302) As Judge Cudahy noted in dissent, "[T]here was nothing in the probate court records from which Cuccio could have suspected fraud in the 1967 and 1968 sales." App. A-15.

5. "Also available as part of the public record was the First Interim Account filed by Mary Norris and William Wirtz as co-executors, which disclosed the three sales and the sale prices." (Br. in Opp. at 6) In fact, the First Interim Account did not disclose who the purchasers were, namely, that the Wirtzes had bought the shares from themselves through the device of a redemption. (PX 5)

6. "The undisputed evidence was that all of the documents used by other lawyers to file suit in December 1980

were clearly available to attorney Cuccio. . . ." (Br. in Opp. at 21) In fact, there was *no* evidence to support this statement.

7. "The complaint in effect asserted that the unfairness of the prices was disclosed on the face of the probate court petitions, the balance sheets supporting the petitions and the will; i.e., that the sales were self-dealing transactions made at the book value of the shares, a value which bears no relationship to 'fair market price.' " (Br. in Opp. at 7) This is the most egregious misstatement of all. In fact, the complaint made no such allegation. The complaint alleged that the "unfairness" of the prices was *not* disclosed in those materials but was wrongfully concealed from both petitioner and the probate judge. The unfairness was not, and could not be, known until it was discovered that there was "no relationship" between the cost values on the balance sheets and fair market value of the assets. (R. Item 1)[5]

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

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[5] Respondents additionally argue that the Seventh Circuit's "independent review" was an application of the judgment n.o.v. standard. (Br. in Opp. 23-24) However, this contention simply does not comport with the evidence, summarized by Judge Cudahy. The majority "reweighed" the evidence, and that is not "faithful to the judgment n.o.v. standard or the Seventh Amendment."